

Chapter 2: Procedures in Drunk Driving and DWLS Cases

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This chapter traces the steps of a criminal action involving a violation of Vehicle Code §625 or §904, focusing on procedural issues that are particularly significant in these types of cases.

2.1 Investigative Stops

A. Constitutional Limitations

Brief investigative stops short of arrest are permitted where police have a reasonable suspicion of ongoing criminal activity. The criteria for a constitutionally valid investigative stop are that the police have “a particularized suspicion, based on an objective observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing.” *People v Peebles*, 216 Mich App 661, 665 (1996), citing *People v Shabaz*, 424 Mich 42, 59 (1985). “Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or ‘hunch,’ but less than the level of suspicion required for probable cause.” *People v Champion*, 452 Mich 92, 98 (1996). A totality of the circumstances test is used in cases involving investigative stops. *People v Christie (On Remand)*, 206 Mich App 304, 308 (1994), citing *Terry v Ohio*, 392 US 1 (1968) and *People v Faucett*, 442 Mich 153, 168 (1993).

In *People v Whalen*, 390 Mich 672, 682 (1973), the Michigan Supreme Court articulated the following rules regarding the stopping, searching, and seizing of motor vehicles and their contents:

- Reasonableness is the test that is to be applied for both the stop and search of motor vehicles.
- Reasonableness will be determined from the facts and circumstances of each case.
- Fewer foundation facts are needed to support a finding of reasonableness when moving vehicles are involved than if a house or home were involved.
- An investigatory stop of a vehicle may be based upon fewer facts than needed to support a finding of reasonableness where both a stop and a search are conducted by police.

Police may properly stop a vehicle for an observed defective equipment violation. *People v Rizzo*, 243 Mich App 151, 156 (2000).

In *Christie, supra*, the Court of Appeals expressed the general principle that erratic driving can give rise to a reasonable suspicion of unlawful intoxication that justifies an investigatory stop by police. Applying this principle, the Court upheld the stop of a vehicle seen swerving, driving on the lane markers, and operating for two-tenths of a mile with its turn signal flashing. In this case, the Court held that the stop was “a minimal intrusion of defendant’s Fourth Amendment rights in light of defendant’s potential danger to the public.” 206 Mich App at 310.

See also *Peebles, supra*, in which the Court of Appeals upheld the investigatory stop of a vehicle traveling without headlights in a parking lot at 3:30 a.m., finding the circumstances sufficient to give rise to a reasonable suspicion of careless driving or theft.

Following a proper investigative stop of an automobile, a law enforcement officer is “permitted to briefly detain the vehicle and make reasonable inquiries aimed at confirming his [or her] suspicions.” *People v Yeoman*, 218 Mich App 406, 411 (1996), citing *People v Nelson*, 443 Mich 626, 637 (1993).

Police are not required to give *Miranda* warnings to persons whose vehicles have been pulled over in an investigative stop. The *Miranda* safeguards apply only after a person is in custody for an offense. *People v Chinn*, 141 Mich App 92, 96 (1985).

A police officer may ask a motorist to exit his or her vehicle and perform roadside sobriety tests solely on the basis of a strong odor of intoxicants on the motorist’s breath. *Rizzo, supra* at 152. In *Rizzo*, a Michigan State Police trooper stopped defendant’s car for a defective equipment violation (broken taillight). The trooper approached the vehicle and asked defendant for her license, registration, and proof of insurance. While defendant explained to the trooper how her taillight had been broken, the trooper detected a strong odor of intoxicant’s on defendant’s breath. The trooper asked defendant to get out of her car and perform sobriety tests, which defendant performed poorly. The

trooper then asked defendant to submit to a preliminary chemical breath analysis (PBT); defendant registered a 0.11 on the PBT. Defendant was then arrested. *Id.* at 152–53. On appeal, the Court of Appeals stated that when a police officer has stopped a motorist for a suspected law violation unrelated to drunk driving, the requirements for a valid investigative stop must be applied to the officer’s decision to ask the motorist to perform sobriety tests. *Id.* at 156–57, relying on *People v Burrell*, 417 Mich 439, 456–57 (1983). The Court held that a strong odor of intoxicants provides the requisite “reasonable suspicion” to instruct a motorist to perform field sobriety tests:

“A police officer need not suspect that a motorist’s blood alcohol content is above or below a certain numerical limit before conducting roadside sobriety tests. Rather, he merely must have a reasonable suspicion that the motorist has consumed intoxicating liquor, which may have affected the motorist’s ability to operate a motor vehicle. In order to confirm or dispel such reasonable suspicions, we hold that a police officer may instruct a motorist to perform roadside sobriety tests.” *Rizzo, supra* at 161.

B. Preliminary Chemical Breath Analysis

MCL 257.625a(2) authorizes police officers to require a person to submit to a preliminary chemical breath analysis where they have reasonable cause to believe that one of the following circumstances exists:

- The person was operating a vehicle on a Michigan public highway, or a place open to the public or generally accessible to vehicles, including an area designated for parking, and may have consumed alcohol so that his or her ability to operate the vehicle was affected.
- The person was operating a commercial motor vehicle within the state while his or her blood, breath, or urine contained any measurable amount of alcohol or while he or she had any detectable presence of intoxicating liquor.
- The person was under age 21 and operating a vehicle on a Michigan public highway, or a place open to the public or generally accessible to vehicles, including an area designated for parking, while he or she had any bodily alcohol content as defined in the zero tolerance provision of Vehicle Code §625(6).

A police officer may arrest a person based in whole or in part upon the results of a preliminary chemical breath analysis. MCL 257.625a(2)(a). See Section 2.2, below, for more discussion of police authority to make a warrantless arrest in drunk driving cases.

Refusal to submit to a preliminary chemical breath analysis will result in misdemeanor or civil sanctions. MCL 257.625a(2)(d), (5). See Section 3.9 of this volume for discussion of this offense.

A person who submits to a preliminary chemical breath analysis remains subject to the requirements of the implied consent statute and the provisions for its enforcement. MCL 257.625a(2)(c). See Section 2.3, below, for discussion of the implied consent statute.

The use of preliminary chemical breath analysis results as evidence is discussed in Section 2.8(A), below.

2.2 Police Authority to Arrest Without a Warrant

The discussion in this section addresses police officers' warrantless arrest authority in drunk driving cases. It is limited to the statutory and other legal principles that are most frequently at issue in these cases, and is not intended to be a comprehensive discussion of warrantless arrest under Michigan law.

For a discussion of arrest warrants, see Smith, *Issuance of Complaints & Arrest Warrants—Revised Edition* (MJJ, 2003).

A. Statutory Authority

MCL 764.15(1) states in relevant part:

“(1) A peace officer, without a warrant, may arrest a person in any of the following situations:

“(a) A felony, misdemeanor, or ordinance violation is committed in the peace officer's presence.

“(b) The person has committed a felony although not in the peace officer's presence.

“(c) A felony in fact has been committed and the peace officer has reasonable cause to believe the person committed it.

“(d) The peace officer has reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days or a felony has been committed and reasonable cause to believe the person committed it.

* * *

“(f) The peace officer has received positive information broadcast from a recognized police or other governmental radio station, or teletype, that affords the peace officer reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days or a felony has been committed and reasonable cause to believe the person committed it.

* * *

“(h) The peace officer has reasonable cause to believe the person was, at the time of an accident in this state, the operator of a vehicle involved in the accident and was operating the vehicle in violation of section 625(1), (3), (6), or (7) or section 625m of the Michigan vehicle code, 1949 PA 300, MCL 257.625 and 257.625m, or a local ordinance substantially corresponding to section 625(1), (3), (6), or (7) or section 625m of that act.

“(i) The person is found in the driver’s seat of a vehicle parked or stopped on a highway or street within this state if any part of the vehicle intrudes into the roadway and the peace officer has reasonable cause to believe the person was operating the vehicle in violation of section 625(1), (3), (6), or (7) or section 625m of the Michigan vehicle code, 1949 PA 300, MCL 257.625 and 257.625m, or a local ordinance substantially corresponding to section 625(1), (3), (6), or (7) or section 625m of that act.

“(j) The peace officer has reasonable cause to believe the person was, at the time of an accident, the operator of a snowmobile involved in the accident and was operating the snowmobile in violation of section 82127(1) or (3) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.82127, or a local ordinance substantially corresponding to section 82127(1) or (3) of that act.

“(k) The peace officer has reasonable cause to believe the person was, at the time of an accident, the operator of an ORV involved in the accident and was operating the ORV in violation of section 81134(1) or (2) or 81135 of the natural resources and environmental protection act, 1994 PA 451, MCL 324. 81134 and 324.81135, or a local ordinance substantially corresponding to section 81134(1) or (2) or 81135 of that act.

“(l) The peace officer has reasonable cause to believe the person was, at the time of an accident, the operator of a

vessel involved in the accident and was operating the vessel in violation of section 80176(1) or (3) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.80176, or a local ordinance substantially corresponding to section 80176(1) or (3) of that act.”

Michigan’s drunk driving statutes contain two provisions that are similar to MCL 764.15(1)(h) and (i). MCL 257.625a(1)(a) provides for warrantless arrest where:

“[t]he peace officer has reasonable cause to believe the person was, at the time of an accident in this state, the operator of a vehicle involved in the accident and was operating the vehicle in violation of [MCL 257.625] or a local ordinance substantially corresponding to [MCL 257.625].”

MCL 257.625a(1)(b) provides for warrantless arrest where:

“[t]he person is found in the driver’s seat of a vehicle parked or stopped on a highway or street within this state if any part of the vehicle intrudes into the roadway and the peace officer has reasonable cause to believe the person was operating the vehicle in violation of [MCL 257.625] or a local ordinance substantially corresponding to [MCL 257.625].”

See Section 1.3(F) of this volume for a definition of “operating” a vehicle. The requirements for an “accident” are discussed at Section 2.4(B)(1) of this volume.

MCL 764.2a(1)(a)-(c) authorize county, city, village, township, and university peace officers to exercise their authority outside their municipality’s geographical boundaries in any of the following circumstances:

- If the officer is enforcing a law of this state in conjunction with the Michigan State Police.
- If the officer is enforcing a law of this state in conjunction with a peace officer of any county, city, village, township, or university in which he or she may be.
- If the officer has witnessed an individual violate any of the following within the geographical boundaries of the officer’s municipality or university and immediately pursued the individual outside of that boundary:
 - A law of this state or administrative rule;
 - A local ordinance;

- A law of this state, administrative rule, or local ordinance that is a civil infraction, municipal civil infraction, or state civil infraction.

Additionally, MCL 764.2a now provides that an officer pursuing an individual in any of the foregoing circumstances may stop and detain the individual outside the geographical boundaries of the officer's municipality or university for the purpose of enforcing that law, administrative rule, or ordinance or enforcing any other law, administrative rule, or ordinance before, during, or immediately after detaining the individual. MCL 764.2a(2).

B. Reasonable Cause to Make a Warrantless Arrest

In criminal cases, “reasonable cause” is shown by facts leading a fair-minded person of average intelligence and judgment to believe that an incident has occurred or will occur. *People v Richardson*, 204 Mich App 71, 79 (1994). See also *People v Lyon*, 227 Mich App 599, 611 (1998), citing *Illinois v Gates*, 462 US 213, 243 n 13 (1983) (Probable cause requires “only a probability or substantial chance of criminal activity, not an actual showing of criminal activity.”)

Probable cause to make an arrest may be established in whole or in part based upon the results of a preliminary chemical breath analysis.* The results of this analysis are admissible (along with other competent evidence) in a criminal prosecution for a drunk driving offense enumerated in §625c(1) to assist the court in determining a challenge to the validity of an arrest. MCL 257.625a(2)(a)–(b)(i).

Note: The offenses enumerated in §625c(1)* are:

- OWI under §625(1).
- OWVI under §625(3).
- OWI or OWVI causing death or serious impairment of a body function under §625(4) or (5).
- Zero tolerance violations under §625(6).
- Child endangerment under §625(7).

*See Section 2.1(B), above, for situations where a preliminary chemical breath analysis may be required.

*MCL 257.625c(1) is the “implied consent” statute.

*OWPD is operating a motor vehicle with any amount of certain controlled substances in the operator's body, a new violation added by 2003 PA 61, effective September 30, 2003.

- OWPD* under §625(8).
- Operating a commercial motor vehicle and refusing to submit to a preliminary chemical breath analysis under §625a(5).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m.
- Violation of a local ordinance substantially corresponding to §625(1), (3), (6), or (8), §625a(5) or §625m.
- Felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, if the police had reasonable grounds to believe the driver was operating the vehicle in violation of §625.

C. Warrantless Arrest Incident to Securing Medical Attention After an Accident

Police officers may enter a home without a warrant when they reasonably believe that a person inside the home may be seriously injured. Once inside, they may arrest for misdemeanor violations of city ordinances, OWI, and leaving the scene of a personal injury accident, if, after proper entry, they have reasonable cause to believe that the person was the driver of a vehicle involved in the accident. *City of Troy v Ohlinger*, 438 Mich 477, 478-79 (1991).

In *Ohlinger*, a police officer followed the defendant from the scene of an auto accident to a home. The vehicle involved in the accident was parked in the driveway of the home. After ringing the doorbell and attempting unsuccessfully to telephone the residence, the officer shined a light into a window and saw the defendant lying on a bed. The defendant was not moving, and was bleeding from the head. The officer entered the home through an unlocked door and roused the defendant, who was not seriously injured. While speaking with the defendant, the officer noted the odor of alcohol on the defendant's breath, along with unsteadiness and slurred speech. A witness to the auto accident was summoned to the home, where he identified the defendant as the driver of a vehicle involved in the accident. The defendant was arrested and charged with OWI, city ordinance violations, and leaving the scene of a personal injury accident. The district court ruled that the officer's entry into the defendant's home was lawful, and denied the defendant's motion to suppress all evidence obtained as a result of the entry. On appeal, the Michigan Supreme Court upheld the district court's decision. With respect to the officer's entry into defendant's home, the Court held:

“Where the police have probable cause, based on specific, articulable facts, to believe that immediate entry is necessary to assist a person who may be in serious need of medical aid, they may enter without a warrant. The entry must be limited to the justification therefor, and the officer

must be motivated primarily by the perceived need to render aid or assistance. The officer may not do more than is reasonably necessary to determine whether a person is in need of assistance, and to provide that assistance.” 438 Mich at 483–484.

In so holding, the Court noted that entry would not have been justified solely on the basis that the defendant may have been intoxicated. 438 Mich at 484 n 5.

Regarding the warrantless arrest of the defendant for a misdemeanor, the Court held that “once lawfully inside a residence, a police officer may make an arrest without a warrant that is authorized by law.” *Id.* at 486. In the *Ohlinger* case, the arresting officer was lawfully on the premises to investigate a possible serious medical emergency. As a result of that investigation, the officer had reasonable cause to believe that defendant was involved in an accident and driving while intoxicated in violation of an ordinance corresponding to a state statute, permitting a warrantless arrest under MCL 764.15(1)(h). 438 Mich at 486.

D. Suppressing Evidence After an Unlawful Arrest

An illegal arrest does not automatically preclude the prosecutor from bringing a prosecution. The appropriate remedy is to suppress the evidence obtained as a result of the arrest. If the prosecution still has sufficient evidence not tainted by the illegal arrest, the case may proceed to trial. *People v Spencely*, 197 Mich App 505, 508 (1992), citing *Wong Sun v United States*, 371 US 471 (1963).

The Exclusionary Rule applies only to constitutionally invalid arrests, not statutorily invalid arrests. *People v Lyon*, 227 Mich App 599, 611 (1998). “The constitutional validity of an arrest depends on whether probable cause existed at the moment the arrest was made. . . .” *Id.* Violation of MCL 764.2a* does not require exclusion of evidence obtained as a result of the violation. *People v Hamilton*, 465 Mich 526, 535 (2002).

The defendant in *Lyon, supra* was found arguing with another man outside of a vehicle parked on a highway exit ramp. When approached by police, the defendant admitted he had driven and parked the vehicle. He requested a preliminary breath test, which showed a blood alcohol content of 0.353 percent, and was arrested without a warrant for OWI. The defendant then voluntarily submitted to a blood alcohol test, which revealed a 0.34 alcohol content. The defendant filed a motion in district court to suppress the evidence obtained after his arrest, including the results of the blood alcohol test. He asserted that his arrest on misdemeanor charges was illegal because the alleged offense was not committed in the officer’s presence. Moreover, defendant argued that the situation did not fit into the “accident” exception to the warrant requirement.* The Court of Appeals affirmed the district court’s

*MCL 764.2a deals with an officer’s authority to arrest outside of his or her bailiwick. See Section 2.2(A), above.

*The exception for parked vehicles in MCL 257.625a(1)(b) was not in effect at the time at issue in this case.

denial of the defendant's motion to suppress the evidence. The Court agreed that the arrest was "statutorily invalid" on the grounds asserted by the defendant. However, the Court further noted that to invoke the exclusionary rule, the defendant's arrest must also have been "constitutionally invalid." The constitutional validity of an arrest depends upon whether probable cause to arrest existed at the moment of the arrest; probable cause requires "only a probability or substantial chance of criminal activity, not an actual showing of criminal activity." 227 Mich App at 611, citing *Illinois v Gates*, 462 US 213, 243 n 13 (1983). In this case, the Court held that the facts clearly support a finding that probable cause to arrest existed. Defendant smelled of alcohol, and had watery eyes, slurred speech, and poor balance. The other man at the scene told the officer that he had found defendant asleep behind the wheel of the vehicle, and the defendant admitted that he had driven the vehicle to the location where it was parked. 227 Mich App at 612.

E. Defendant Rights at Arrest

1. Fifth Amendment Privilege Against Self-Incrimination

An accused person has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation in order to protect the Fifth Amendment privilege against compulsory self-incrimination. *Miranda v Arizona*, 384 US 436 (1966). This right is subject to the following limitations:

- The Fifth Amendment right to counsel attaches only when **the accused is in custody**. *People v Bladel (After Remand)*, 421 Mich 39, 51 (1984), aff'd *Michigan v Jackson*, 475 US 625 (1986). See *Berkemer v McCarty*, 468 US 420, 434 (1983), in which a driver's statements to a police officer made prior to the driver's arrest for drunk driving were admissible into evidence despite the officer's failure to read the *Miranda* warnings to the driver.

Note: An arrest occurs when there is a taking, seizing, or detaining of a person, either by touching or putting hands on him or her, or by any act that indicates the intent to take the person into custody and subjects the person to the actual control and will of the arresting officer. The act relied upon as constituting an arrest must have been performed with the intent to effect an arrest and must have been so understood by the party arrested. *People v Gonzales*, 356 Mich 247, 253 (1959), citing 4 Am Jur, Arrest, §2. A police officer's unarticulated plan regarding arrest has no bearing on the question whether a suspect is "in custody"; the only relevant inquiry is how a reasonable person in the suspect's position would understand the situation. *People v Chinn*, 141 Mich App 92, 97 (1985).

- The Fifth Amendment right to counsel attaches only when **the accused is subjected to interrogation**. *People v Bladel, supra*. In *Pennsylvania v Muniz*, 496 US 582, 603–605 (1990), a drunk

driving suspect was arrested and taken to a booking center without being advised of his *Miranda* rights. At the booking center, the suspect made several incriminating statements while refusing to submit to a Breathalyzer examination and while performing physical sobriety tests. A majority of the U.S. Supreme Court held that the statements were admissible at trial because they were made voluntarily and not elicited in response to custodial interrogation. The majority found that the officers who communicated with the suspect in these contexts limited their remarks to providing instructions regarding the tests at issue; the officers' remarks did not call for verbal responses from the suspect except as to whether he understood the instructions.

- The privilege against self-incrimination protects the accused from being compelled to provide evidence of a testimonial or communicative nature, but not from being compelled to produce real or physical evidence. To be “testimonial,” the communication must explicitly or implicitly relate a factual assertion or disclose information. *Pennsylvania v Muniz*, *supra*, 496 US at 588–589. In *Muniz*, a drunk driving suspect was arrested and taken to a booking center without being advised of his *Miranda* rights. The suspect's actions and voice were videotaped at the booking center, where he answered routine booking questions about his name, address, height, weight, eye color, date of birth, and age, stumbling over two responses. He was also asked (and was unable to give) the date of his sixth birthday. Both the audio and video portions of the videotape were later admitted into evidence at trial. A majority of the U.S. Supreme Court held that the suspect's Fifth Amendment rights were violated by the admission of that part of the videotape in which the suspect could not give the date of his sixth birthday, because the content of his answer was a testimonial response supporting an inference that his mental state was confused. 496 US at 599. However, the Court's majority upheld the admission of those portions of the videotape showing the suspect's slurred speech while answering routine booking questions, finding that the suspect's lack of muscular coordination was not a testimonial component of his responses to questions. 496 US at 590–591.
- A plurality of the U.S. Supreme Court has held that the *Miranda* protections do not attach to **routine booking questions** asked for record-keeping purposes, which are reasonably related to police administrative concerns. Such questions may be asked to secure the biographical data necessary to complete booking or pretrial services, and include a suspect's name, address, height, weight, eye color, date of birth, or age. *Pennsylvania v Muniz*, *supra*, 496 US at 601–602.

2. Sixth Amendment Right to Counsel

The right to counsel attaches at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment. The accused is entitled to counsel not only at trial, but at all “critical stages” of the prosecution, i.e., those stages where counsel’s absence might derogate from the accused’s right to a fair trial. Regardless of whether the accused is in custody or subjected to formal interrogation, the Sixth Amendment right to counsel exists whenever the police attempt to elicit incriminating statements. This right to counsel does not depend on a request by the accused and courts indulge in every reasonable presumption against waiver. *People v Bladel (After Remand)*, 421 Mich 39, 52 (1984), *aff’d Michigan v Jackson*, 475 US 625 (1986).

The Michigan Court of Appeals has held that the Sixth Amendment does not provide the accused with a right to counsel in deciding whether to submit to a Breathalyzer test. *Ann Arbor v McCleary*, 228 Mich App 674, 678 (1998). However, a drunk driving suspect should be given a reasonable opportunity to telephone an attorney before making this decision, as a “commendable police practice.” *Hall v Secretary of State*, 60 Mich App 431, 441 (1975). See also *Holmberg v 54—A District Judge*, 60 Mich App 757, 760 (1975).

The Court of Appeals has refused to extend the *Hall* decision to protect the privacy of attorney-client communications prior to administration of a Breathalyzer test. In *Ann Arbor v McCleary*, *supra*, 228 Mich App at 681, the Court held that it was no violation of the right to counsel where police would not allow a private meeting between a drunk driving suspect and his attorney prior to administration of a Breathalyzer test.

2.3 Chemical Tests Under the Vehicle Code’s “Implied Consent” Provisions — §625c

MCL 257.625c(1) provides that persons who operate vehicles in Michigan give implied consent to chemical tests of their blood, urine, or breath when arrested for certain drunk driving violations listed in the statute. Tests administered pursuant to §625c are subject to specific requirements set forth in MCL 257.625a(6). Refusal to submit to a chemical test under these “implied consent” provisions of the Vehicle Code can result in licensing sanctions pursuant to MCL 257.625g.

This section addresses the following issues arising under the Vehicle Code’s “implied consent” provisions:

- The circumstances under which a person is deemed to have given implied consent to chemical testing under §625c.
- The requirements for administering chemical tests under §625a(6).

- Issuance of a temporary license where a chemical test reveals an unlawful alcohol content.
- Procedures that apply when a person refuses to submit to a chemical test.
- Licensing sanctions for unlawful failure to submit to a chemical test.

For discussion of arrests in drunk driving cases generally, see Section 2.2, above. Search warrants for chemical tests are discussed in Section 2.4, below. The admissibility at trial of evidence based on chemical tests conducted pursuant to §625a(6) is addressed in Section 2.8(B), below.

Note: A chemical test of a person's blood, urine, or breath pursuant to §625a(6) should be distinguished from a preliminary chemical breath analysis under §625a(2), which occurs prior to arrest. A discussion of this type of test appears at Section 2.1(B), above and Section 3.8 of this volume.

A. Applicability of §625c

A person is considered to have consented to chemical tests of the blood, breath, or urine for purposes of determining the amount of alcohol and/or the presence of a controlled substance in the body when the following prerequisites of MCL 257.625c(1) are met:

- The person operated a vehicle upon a Michigan highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles;* and,
- The person is arrested for one of the following offenses:
 - OWI under §625(1).
 - OWVI under §625(3).
 - OWI or OWVI causing death or serious impairment of a body function under §625(4) or (5).
 - Zero tolerance violations under §625(6).
 - Child endangerment under §625(7).
 - OWI under §625(8).
 - Operating a commercial motor vehicle and refusing to submit to a preliminary chemical breath analysis under §625a(5).
 - Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m.

*See Section 1.3 of this volume for definitions of “generally accessible to motor vehicles,” “operating,” and “controlled substance.”

- Violation of a local ordinance substantially corresponding to §625(1), (3), (6), or (8), §625a(5) or §625m.
- Felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, if the police had reasonable grounds to believe the driver was operating the vehicle in violation of §625.

Persons afflicted with hemophilia, diabetes, or a condition requiring them to use an anticoagulant under a physician's direction are not considered to have given consent to the withdrawal of blood. MCL 257.625c(2).

In *People v Borchard-Ruhland*, 460 Mich 278, 285 (1999), the Michigan Supreme Court held that only those persons who have been *arrested* fall within the purview of MCL 257.625c. If a blood sample is taken from a person at a police officer's request *prior to* his or her arrest on drunk driving charges, the validity of the person's consent to giving the sample must be evaluated pursuant to the search and seizure principles under US Const, Am IV, and Const 1963, art 1, §11. *Borchard-Ruhland*, *supra* at 295. In so holding, the Court rejected the contention that the implied consent statute is presumed to apply to *all* chemical testing, and refused to require officers seeking a blood alcohol test to expressly disclaim reliance on the statute in order to overcome the presumption.

*See Section 2.4, below, on search warrants for chemical testing.

When a blood sample is taken pursuant to a search warrant, the implied consent statute does not apply.* The warrant process exists independently of the testing procedures set forth in the implied consent statute. *People v Jagotka*, 232 Mich App 346, 353 (1998), *rev'd on other grounds* 461 Mich 274 (1999), and *Manko v Root*, 190 Mich App 702, 704 (1991).

The implied consent statute also does not apply to blood tests taken for medical treatment after an accident, or if the driver dies, a sample of the decedent's blood taken by the medical examiner. See MCL 257.625a(6)(e)–(f) and Section 2.4(B)(1), below.

B. Administering Chemical Tests Under §625c

Administration of chemical tests under §625c is governed by MCL 257.625a(6). This subsection addresses the advice that police must give to the person arrested and the manner of conducting chemical tests. MCL 257.625g sets forth procedures that apply during the time pending the outcome of test results and after the test results have been received.

1. Advice That Must Be Given the Person Arrested

MCL 257.625a(6)(b) requires that a person arrested for one of the crimes described in §625c(1)* shall be advised of all of the following:

*These crimes are listed above at Section 2.3(A), above.

“(i) If he or she takes a chemical test of his or her blood, urine, or breath administered at the request of a peace officer, he or she has the right to demand that a person of his or her own choosing administer 1 of the chemical tests.

“(ii) The results of the test are admissible in a judicial proceeding as provided under this act and will be considered with other admissible evidence in determining the defendant’s innocence or guilt.

“(iii) He or she is responsible for obtaining a chemical analysis of a test sample obtained at his or her own request.

“(iv) If he or she refuses the request of a peace officer to take a test described in subparagraph (i), a test shall not be given without a court order, but the peace officer may seek to obtain a court order.

“(v) Refusing a peace officer’s request to take a test described in subparagraph (i) will result in the suspension of his or her operator’s or chauffeur’s license and vehicle group designation or operating privilege and in the addition of 6 points to his or her driver record.”

In *People v Green*, 260 Mich App 392, 406 (2004), the Court of Appeals acknowledged that defendant Green had been arrested, at least in part, for an OWI violation and that he “should have been advised” of his right to an “independent” chemical test as stated in MCL 257.625a(6)(b)(i). However, the Court disagreed with Green’s assertion that the police officers’ failure to so advise him should result in dismissal of the OWI charge. *Green, supra* at 406. The Court explained that an accused’s right to obtain an “independent” chemical test is premised on “the taking of a chemical test administered at the request of police officers.” *Green, supra* at 407, quoting *People v Dewey*, 172 Mich App 367, 373 (1988). The court concluded that defendant Green was not entitled to an “independent” chemical test because his blood test was administered at the hospital at the direction of a medical doctor as part of his care. *Green, supra* at 407.

In addition to the statutory notices that must be given under §625a(6)(b), persons arrested for drunk driving must be informed of any police administrative rules that materially affect their decisions regarding chemical tests. In *People v Castle*, 108 Mich App 353, 355 (1981), police arrested the defendant for OWI, advised him of his rights under the implied consent statute, and asked him to take a Breathalyzer test. The defendant refused to take the test without first consulting his attorney. An hour and ten minutes later, the attorney arrived and asked that defendant be given the Breathalyzer test. The police refused to administer the test, citing a departmental policy not to give a test if more than one hour elapsed since the request for it. Because the defendant had not been informed of this policy, he moved to dismiss the

charges against him. The Court of Appeals held that the charges should be dismissed, stating that “...any person charged with [OWI] must be informed of police regulations and rules, if any, that materially affect him to insure that the accused has an opportunity to make an informed decision.” 108 Mich App at 357.

In *People v Borchard-Ruhland*, 460 Mich 278, 285 (1999), the Michigan Supreme Court held that the foregoing advice need only be given to persons who have been *arrested* for one of the crimes described in §625c(1). Blood samples taken at a police officer’s request *prior to* an arrest for drunk driving fall outside the purview of §625c and the notice requirements of §625a(6)(b). In cases not governed by §625c, the validity of a person’s consent to a chemical test requested by an officer must be evaluated pursuant to the search and seizure principles under US Const, Am IV, and Const 1963, art 1, §11. *Borchard-Ruhland*, *supra* at 295.

A chemical analysis of blood drawn after an accident for purposes of medical treatment may be admitted into evidence in a civil or criminal proceeding regardless of whether the person from whom it was taken was advised of his or her rights under the implied consent statute. Also, if the driver dies, a blood sample of the decedent taken by the medical examiner is not subject to the implied consent statute. See MCL 257.625a(6)(e)–(f) and Section 2.4(B)(1), below.

2. Manner of Conducting Chemical Tests

A police officer who requests a chemical test from a person must have reasonable grounds to believe that the person has committed a crime described in §625c(1).^{*} MCL 257.625a(6)(d). A sample or specimen of urine or breath must be taken and collected in a reasonable manner. A blood sample may only be taken by a licensed physician or a person operating under the delegation of a licensed physician who is qualified to withdraw blood and acting in a medical environment at a police officer’s request. MCL 257.625a(6)(c).

A person arrested for committing a crime described in §625c(1) must be given a reasonable opportunity to have someone of his or her own choosing administer a blood, urine, or breath test within a reasonable time of the arrest. Persons who exercise this right are responsible for obtaining a chemical analysis of the test sample. MCL 257.625a(6)(d). In *People v Underwood*, 153 Mich App 598, 600 (1986), the Court of Appeals reversed a defendant’s OWI conviction because he was denied the statutory right to have an independent blood test. The *Underwood* defendant made two clear requests for an alternative blood test at the scene of his arrest and at the police station. Police officers talked him out of the independent test by telling him it would show a higher blood alcohol level and that he would go to jail anyway. The Court of Appeals reversed defendant’s conviction on charges of OWI-2d offense, concluding that even though the defendant was persuaded by the

^{*}These crimes are listed at Section 2.3(A), above.

officers' remarks, he was deprived of an opportunity to obtain exculpatory evidence by an independent blood test. 153 Mich App at 600.

The Department of State Police has promulgated uniform rules for the administration of chemical tests under §625a(6). These can be found at 1994 AACCS, R 325.2651 et seq. and 1993 AACCS, R 325.2671 et seq. Persons arrested for drunk driving must be informed of any police administrative rules that materially affect their decisions regarding chemical tests. See *People v Castle*, 108 Mich App 353 (1981), discussed at Section 2.3(B)(1), above.

3. Procedures Pending Results of a Chemical Test

If the results of a chemical test under §625a(6) are not immediately available, the police officer who requested the test shall confiscate the driver's license or permit of the person tested pending receipt of the results. The officer shall issue the person a temporary license or permit if the person is otherwise eligible for a license or permit. The officer shall immediately notify the person of the test results; if they do not reveal an unlawful alcohol content, the officer shall immediately return the person's license or permit by first class mail. MCL 257.625g(2).

Under MCL 257.625g(4), "unlawful alcohol content" means any of the following:

- If the person tested is less than 21 year old, 0.02 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
- If the person tested was operating a commercial motor vehicle, 0.04 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
- For all other persons, 0.08 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or beginning October 1, 2013, 0.10 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

4. Disclosure to the Defendant of Evidence Gained from a Chemical Test

If a chemical test described in §625a(6) is administered, test results shall be made available to the defendant or his or her attorney upon written request to the prosecutor, with a copy of the request filed with the court. The prosecutor shall furnish the results at least two days before the date of the trial. The prosecutor shall offer the test results as evidence in the trial. Failure of the prosecutor to fully comply with the request bars the admission of the results into evidence by the prosecution. MCL 257.625a(8).

MCL 257.625a(8) requires only that a prosecuting attorney “furnish” the test “results” not less than two days before trial; it does not require a prosecuting attorney to furnish a written report of such results. *People v Lounsbury*, 246 Mich App 500, 507–08 (2001). In *Lounsbury*, hospital staff drew blood from the defendant, and the resulting toxicology report indicated an unlawful blood-alcohol content. Defendant made a pretrial discovery demand for “[t]he results of any test, whether chemical or physical, take[n] of the Defendant . . .” *Id.* at 502. The prosecuting attorney informed defendant of the results at a pretrial hearing but did not give the defendant a copy of the toxicology report until the day of trial. *Id.* at 503. The District Court denied defendant’s motion to suppress the report, but the Circuit Court reversed. The Court of Appeals reversed the Circuit Court. The Court of Appeals found no requirement in the statute that the “results” of a test be furnished in writing. Moreover, earlier versions of the statute did require the prosecuting attorney to provide a defendant with a copy of a report indicating blood-alcohol content. *Id.* at 507. The Court did note that disclosure of a copy of a toxicology or similar report may be required under MCR 6.201 or *Brady v Maryland*, 373 US 83 (1963).

In *People v Stoney*, 157 Mich App 721, 725 (1987), the Court of Appeals held that it is the results of a blood test that must be disclosed to a drunk driving defendant pursuant to §625a, not blood samples themselves. The defendant in *Stoney* was charged with felonious driving as a result of a one-car accident. The police officers found defendant bleeding and incoherent at the scene and took him to a hospital, where they requested staff to conduct a blood alcohol test. The hospital staff complied, and then discarded all of defendant’s blood samples after seven days. Defendant made a motion to dismiss the charge and/or to suppress the test results on the basis that blood samples were evidence that must be made available to defendant so that he could have them independently tested in order to impeach the state’s test results. The Court of Appeals disagreed with the defendant, holding that the results of the blood test, not the blood samples themselves, are admissible in court; therefore, only the test results must be made available to defendants.

In a similar case, the Court of Appeals held that the routine discarding of non-reusable Breathalyzer test ampoules by police officers does not constitute an impermissible suppression of evidence. *People v Tebo*, 133 Mich App 307, 312 (1984). The Court in *Tebo* reasoned that because the defendant can have an independent chemical test conducted under the implied consent statute, none of the defendant’s rights are compromised by destruction of the state’s test ampoules. *Id.* at 312.

5. License Confiscation Where a Chemical Test Reveals an Unlawful Alcohol Content

If a person submits to a chemical test under §625a(6), or such a test is performed pursuant to a court order, and the test reveals an unlawful alcohol content, the police officer who requested the person to submit to the test shall do all of the following, as required by MCL 257.625g(1):

- Immediately confiscate the person's license or permit to operate a motor vehicle, and issue a temporary license or permit if the person is otherwise eligible for a license or permit.
- Notify the Secretary of State by means of the law enforcement information network that a temporary license or permit was issued to the person.
- Destroy the person's license or permit.

Under MCL 257.625g(4), "unlawful alcohol content" means any of the following:

- If the person tested is less than 21 year old, 0.02 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
- If the person tested was operating a commercial motor vehicle, 0.04 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
- For all other persons, 0.08 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or beginning October 1, 2013, 0.10 grams or more of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.*

*See 2003 PA 61, effective September 30, 2003.

The temporary license or permit issued under §625g is valid for one of these time periods provided by MCL 257.625g(3):

- If the case is not prosecuted, for 90 days after issuance or until the person's license or permit is suspended under MCL 257.625f (the implied consent hearing statute), whichever occurs earlier. The prosecutor shall notify the Secretary of State if a case referred for prosecution is not prosecuted; the arresting police agency shall notify the Secretary of State if a case is not referred for prosecution.
- If the case is prosecuted, until the criminal charges are dismissed, the person is acquitted, or the person's license or permit is suspended, restricted, or revoked.

C. Procedures in Cases Where a Driver Refuses to Submit to a Chemical Test

1. Confiscation of Driver's License Upon Refusal to Submit to Test

If a person refuses to take a chemical test under §625a(6), the police officer who requested the person to submit to the test shall do all of the following, as required by MCL 257.625g(1):

- Immediately confiscate the person's license or permit to operate a motor vehicle, and issue a temporary license or permit if the person is otherwise eligible for a license or permit.
- Notify the Secretary of State by means of the law enforcement information network that a temporary license or permit was issued to the person, and that the person refused to submit to a chemical test.*
- Destroy the person's license or permit.

*Notice of the person's refusal to submit to testing is required by MCL 257.625d.

The temporary license or permit issued under §625g is valid for one of these time periods provided by MCL 257.625g(3):

- If the case is not prosecuted, for 90 days after issuance, or until the person's license or permit is suspended under MCL 257.625f (the implied consent hearing statute), whichever is earlier. The prosecutor shall notify the Secretary of State if a case referred for prosecution is not prosecuted; the arresting police agency shall notify the Secretary of State if a case is not referred to the prosecutor for prosecution.
- If the case is prosecuted, until the criminal charges are dismissed, the person is acquitted, or the person's license or permit is suspended, restricted, or revoked.

2. Notice of Right to Request Hearing — Sanctions Upon Failure to Request Hearing

If a person refuses a police officer's request to submit to a chemical test offered pursuant to §625a(6), the test shall not be given without a court order. The police officer may seek to obtain a court order. MCL 257.625d(1). The officer must also notify the person in writing that he or she has 14 days from the date of the notice to request a hearing. MCL 257.625e(1). The notice shall state that: 1) failure to request a hearing within 14 days will result in the suspension of the person's license or permit; and 2) there is no requirement that a person retain counsel for the hearing, although counsel would be permitted to represent the person at the hearing. MCL 257.625e(2).

If the person fails to request a hearing within the required 14-day period and the person was operating a vehicle other than a commercial motor vehicle, the Secretary of State will impose a one-year suspension or denial of the person's driver's license. For a second or subsequent refusal within seven years, this period of suspension or denial is increased to two years. MCL 257.625f(1)(a).

3. Procedures Where Hearing Requested

When requested, implied consent hearings are conducted before a hearing officer appointed by the Secretary of State. A hearing must be held within 45 days after the driver's arrest, upon five days' notice to the parties. There are, however, no sanctions for failure to comply with the statutory time limits for holding the hearing. MCL 257.625f(2), 257.322.

Under MCL 257.625f(3), an implied consent hearing must be finally adjudicated within 77 days after the driver's arrest. There are, however, no sanctions for failure to comply with this statutory time limit. Section 625f(3) provides the following exceptions to the 77-day time limit:

- Delay attributable to the unavailability of the defendant, a witness, or material evidence.
- Delay due to an interlocutory appeal.
- Delay due to exceptional circumstances.

The statute specifically provides that delay caused by docket congestion does not constitute an exception to the 77 day rule.

Under MCL 257.625f(4), the hearing shall cover only the following issues:

- Whether the police officer had reasonable grounds to believe that the driver had committed a crime described in §625c(1).*
- Whether the driver was arrested for a crime described in §625c(1).
- Whether the driver's refusal to submit to the chemical test was reasonable.
- Whether the driver was advised of his or her rights under §625a(6).*

*These crimes are listed at Section 2.3(A), above.

*These rights are described at Section 2.3(B)(1), above.

A person shall not order a hearing officer to make a particular finding on any of the foregoing issues. MCL 257.625f(5).

Hearing procedures are set forth in MCL 257.322. The hearing officer must make a verbatim record of the hearing. MCL 257.322(4). The record must be prepared and transcribed in accordance with MCL 24.286 of the Administrative Procedures Act. MCL 257.625f(6).

If the person requesting the hearing does not prevail, the Secretary of State shall impose a one-year suspension or denial of the person's driver's license. For a second or subsequent refusal within seven years, this period is increased to two years. MCL 257.625f(7)(a).

The Secretary of State will also assess six points on the driving record of a person whose license is suspended or denied under §625f. However, if a conviction, civil infraction determination, or juvenile court disposition results from the same incident, additional points for that offense shall not be entered. MCL 257.320a(8).

4. Judicial Review of the Hearing Officer's Determination

MCL 257.323 governs appeals from the hearing officer's determination in an implied consent hearing. MCL 257.625f(6), (8).

Appeals may be taken by the person who requested the hearing or the officer who filed the report under §625d.* Officers petitioning for review must do so with the consent of the prosecutor. MCL 257.625f(8).

MCL 257.323(1) provides that appeals from implied consent hearings are taken to the circuit court in the county where the arrest was made. The aggrieved party must file the petition for review within 63 days after the hearing officer's determination is made; however, for good cause shown, this period may be extended to 182 days after the determination.

Once the petition for review is filed, the circuit court must enter an order setting the case for hearing on a day certain not more than 63 days after the date of the order. The order, the petition for review, and all supporting affidavits must be served on the Secretary of State's office in Lansing. The petition must include the driver's full name, address, birth date, and driver's license number. Service must be made not less than 20 days before the hearing date, unless the driver is seeking a review of the record. In the latter case, service must be made not less than 50 days before the hearing date in circuit court. MCL 257.323(2).

Upon notification of the filing of a petition for review, and not less than ten days before the matter is set for hearing, the hearing officer shall transmit to the court the original or a certified copy of the official record of the proceedings. Proceedings at which evidence was presented need not be transcribed and transmitted if the sole reason for review is to determine whether the court will order the issuance of a restricted license. The parties may stipulate that the record be shortened. A party unreasonably refusing to stipulate to a shortened record may be taxed by the court for additional costs. The court may permit subsequent corrections to the record. MCL 257.625f(6).

For a first violation under §625f, the court may take testimony and examine all the facts and circumstances relating to the suspension of a driver's license. The court may affirm, modify, or set aside the suspension; however, it may

*§625d requires officers to file a report of a person's refusal to take a chemical test with the Secretary of State.

not order the Secretary of State to issue a restricted or unrestricted license that would permit a person to drive a commercial motor vehicle hauling a hazardous material. The petitioner shall file a certified copy of the court's order with the Secretary of State's office in Lansing within seven days after entry of the order. MCL 257.323(3).

For sanctions imposed after second or subsequent violations under §625f, the scope of judicial review is more limited. Under MCL 257.323(4), the court shall confine its consideration to a review of the administrative hearing or driving records for a statutory legal issue, and shall not grant restricted driving privileges. The court shall set aside the hearing officer's determination only if the petitioner's substantial rights have been prejudiced because the determination is any of the following:

- In violation of the U.S. Constitution, the Michigan Constitution, or a statute.
- In excess of the Secretary of State's statutory authority or jurisdiction.
- Made upon unlawful procedure resulting in material prejudice to the petitioner.
- Not supported by competent, material, and substantial evidence on the whole record.
- Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion.
- Affected by other substantial and material error of law.

D. Admission of Refusal into Evidence at Trial

A person's refusal to submit to a chemical test under the implied consent provisions of the Vehicle Code is admissible in a criminal prosecution for a crime described in §625c(1) only to show that a test was offered to the defendant, but not as evidence in determining the defendant's guilt or innocence. The jury shall be instructed accordingly. MCL 257.625a(9). A jury instruction on the defendant's decision to forgo chemical testing appears at CJI2d 15.9.*

*The crimes described in §625c(1) are listed at Section 2.3(A), above.

2.4 Search Warrants for Chemical Testing

*See Section 2.3(A), above, for a list of crimes described in §625c(1). A complete discussion of the implied consent statute appears at Section 2.3, above.

A person arrested for a drunk driving offense described in §625c(1) is considered to have consented to chemical tests of the blood, breath, or urine for purposes of determining the amount of alcohol and/or the presence of a controlled substance in the body. MCL 257.625c(1). However, if a person refuses a police officer's request to submit to a chemical test, the test shall not be given without a court order. The police officer may seek to obtain a court order, which often takes the form of a search warrant. MCL 257.625d(1).^{*} This section addresses procedures and due process concerns regarding the issuance of search warrants for chemical tests in drunk driving cases. The discussion also covers exceptions to search warrant requirements and situations where a defendant refuses to comply with a search warrant. For a more complete discussion of search warrants generally, see Smith, *Issuance of Search Warrants—Revised Edition* (MJI, 2003).

Note: When a blood sample is taken pursuant to a search warrant, the implied consent statute does not apply. *Manko v Root*, 190 Mich App 702, 704 (1991).

A. Issuance of a Search Warrant — Substance and Procedures

1. Establishing Probable Cause

MCL 780.653 requires that a magistrate's reasonable or probable cause finding in issuing a search warrant "shall be based upon all the facts related within the affidavit made before him or her." Oral testimony may not be used to supplement the information contained in the affidavit. In *People v Sloan*, 450 Mich 160 (1995), overruled on other grounds 468 Mich 488 (2003) and 460 Mich 118 (1999), the Michigan Supreme Court considered a case where a search warrant was issued for a blood test of a defendant charged with OWI causing death. The affidavit submitted in support of the warrant contained mere conclusions; however, the magistrate issued the warrant after hearing the affiant officer's sworn oral testimony as to the defendant's physical condition at the scene of the accident giving rise to the charges. The trial court denied the defendant's motion to suppress the test results obtained under the warrant, and the defendant appealed. A majority of the Supreme Court found a violation of §653. In response to the prosecutor's argument that probable cause to issue the warrant existed when the conclusions in the affidavit were considered together with the affiant's oral testimony, the Court held:

"[W]hen reviewing courts assess a magistrate's probable cause determination, they may *not* consider sworn, yet unrecorded oral testimony that, contemporaneous with an affidavit, is offered to the magistrate to show probable cause. Our primary reason for so holding is our belief that requiring reviewing courts to consider sworn, yet unrecorded, oral testimony would impose a significant and

unnecessary burden on their ability to reliably assess whether the constitutional requirement for probable cause had been satisfied.” 450 Mich at 173. [Emphasis in original.]

2. Scope of Search Authorized by Warrant

In *People v Mayhew*, 236 Mich App 112, 114 (1999), the Court of Appeals upheld the trial court’s refusal to suppress results of a urine test that showed the presence of a controlled substance in the body of a defendant charged with felonious driving and other related offenses. After the auto accident giving rise to the charges in this case, the defendant was hospitalized and a search warrant issued for his blood test results. Although the warrant specified only the blood test results, the hospital released the results of a urine test that showed the presence of the active ingredient in marijuana. This evidence was admitted over defendant’s objection at trial. On appeal from his conviction, defendant asserted that the search warrant was limited to blood test results, so that his urine test results were beyond its scope. The Court rejected defendant’s assertion that the search warrant for blood test results precluded admission of results of other types of medical tests. *Mayhew, supra* at 119. The Court found that the defendant had no reasonable expectation of privacy with respect to the results of his urine test; accordingly, he had no standing to challenge the government’s action in securing the results from the hospital. *Mayhew, supra* at 119-21, citing *People v Perlos* 436 Mich 305 (1990). (*People v Perlos* is discussed at Section 2.4(B)(1), below.)

3. Issuance Procedures

Usually, a police officer rather than a prosecutor drafts the affidavit in support of a request for a search warrant to obtain a blood test. Therefore, the affidavit and warrant should be carefully reviewed. The following are the recommended steps:

1. Determine that the person to be searched is described with particularity. US Const, Amend IV; Const 1963, art 1, § 11.
2. Determine that the sample to be seized is described with particularity. MCL 780.654(1).
3. Determine that a licensed physician, or a licensed nurse or technician operating under the delegation of a licensed physician and qualified to withdraw blood, will collect the sample requested by the officers. MCL 257.625a(6)(c).
4. Determine that the affidavit establishes reasonable grounds to believe that the person has committed either: OUIL, OWI, zero tolerance, OUIL/OWI causing death, OUIL/OWI causing serious impairment of bodily function, negligent homicide, manslaughter with a motor vehicle, or felonious driving. MCL 257.625a(6)(d).

5. If the affidavit is based on information supplied to affiant by a *named person*, such as another police officer, determine that the affidavit contains affirmative allegations from which the magistrate may conclude that the named person spoke with personal knowledge of the information. MCL 780.653(a).

6. If the affidavit is based on information supplied to affiant by an *unnamed person*, determine that the affidavit contains affirmative allegations from which the magistrate may conclude:

- a. That the unnamed person spoke with personal knowledge; and
- b. That the unnamed person is credible, *or* that the information is reliable. MCL 780.653(b).

7. Swear affiant:

- a. Administer oath. MCL 780.651.
- b. Ask if averments in affidavit are true to best of affiant's information and belief. *Id.*
- c. Ask affiant to sign affidavit. See *People v Mitchell*, 428 Mich 364, 368 (1987) (search warrant based upon an unsigned affidavit is presumed invalid, but the prosecution may rebut the presumption by showing that the affidavit was made on oath to a magistrate).

8. Sign and date affidavit and search warrant. See *People v Barkley*, 225 Mich App 539, 545 (1997) (an unsigned search warrant is presumed invalid, but may the prosecution may rebut the presumption by showing that the magistrate or judge made a determination that the search was warranted and did intend to issue the warrant).

4. Issuance of a Search Warrant by Electronic or Electromagnetic Devices

Effective October 17, 2003, 2003 PA 184 expanded the “electronic or electromagnetic means” by which an affidavit for a search warrant could be made and by which a search warrant could be issued to include “facsimile or over a computer network.”

MCL 780.651(2), as amended provides:

“An affidavit for a search warrant may be made by any electronic or electromagnetic means of communication, including by facsimile or over a computer network, if both of the following occur:

“(a) The judge or district court magistrate orally administers the oath or affirmation to an applicant for a search warrant who submits an affidavit under this subsection.

“(b) The affiant signs the affidavit. Proof that the affiant signed the affidavit may consist of an electronically or electromagnetically transmitted facsimile of the signed affidavit or an electronic signature on an affidavit transmitted over a computer network.”

2003 PA 185 eliminated MCL 780.651(3)’s former provision regarding electronic transmission of a court order issued as a search warrant under MCL 257.625a. Effective October 17, 2003, MCL 780.651(3) states:

“A judge or district court magistrate may issue a written search warrant in person or by any electronic or electromagnetic means of communication, including by facsimile or over a computer network.”

The remaining provisions of MCL 780.651, as amended by 2003 PA 185, that are relevant to the use of electronic or electromagnetic devices in the issuance of search warrants provide:

“(4) The peace officer or department receiving an electronically or electromagnetically issued search warrant shall receive proof that the issuing judge or district court magistrate has signed the warrant before the warrant is executed. Proof that the issuing judge or district court magistrate has signed the warrant may consist of an electronically transmitted facsimile of the signed warrant or an electronic signature on a warrant transmitted over a computer network.

“(5) If an oath or affirmation is orally administered by electronic or electromagnetic means of communication under this section, the oath or affirmation is considered to be administered before the judge or district court magistrate.

“(6) If an affidavit for a search warrant is submitted by electronic or electromagnetic means of communication, or a search warrant is issued by electronic or electromagnetic means of communication, the transmitted copies of the affidavit or search warrant are duplicate originals of the affidavit or search warrant and are not required to contain an impression made by an impression seal.”

B. Exceptions to Search Warrant Requirement

1. Blood Tests Taken After an Accident for Medical Treatment

Search warrant requirements do not apply to blood tests taken for medical treatment after an accident. MCL 257.625a(6)(e) provides that if a driver is transported to a medical facility and a blood sample is withdrawn for medical treatment, the results of a chemical analysis are admissible in any civil or criminal proceeding to show the amount of alcohol and/or presence of a controlled substance in the person's blood at the time of the accident, regardless of whether the person had been offered or had refused a chemical test. The medical facility or person performing the chemical analysis shall disclose the results of the analysis to a prosecutor who requests them for use in a criminal prosecution. The Michigan Supreme Court has held that MCL 257.625a(6)(e) renders the results of blood tests admissible at trial irrespective of whether the physician-patient privilege was waived or a valid search warrant was obtained. *People v Keskimaki*, 446 Mich 240, 247 (1994).

See also *People v Perlos*, 436 Mich 305 (1990), in which the Supreme Court upheld the constitutionality of former MCL 257.625a(9), now MCL 257.625a(6)(e), finding that: 1) blood withdrawn for medical treatment does not implicate the Fourth Amendment because there is no state involvement in the withdrawal, 436 Mich at 315–316; and, 2) the state's warrantless acquisition of such tests does not violate the Fourth Amendment because intoxicated drivers involved in accidents have no reasonable expectation of privacy in blood alcohol test results. 436 Mich at 330.

Note: If a driver is deceased after an accident, a blood sample shall be withdrawn in a manner directed by the medical examiner to determine the amount of alcohol and/or presence of a controlled substance. The medical examiner shall give the results of the chemical analysis to the law enforcement agency investigating the accident; that agency shall forward the results to the Department of State Police. MCL 257.625a(6)(f).

In *People v Keskimaki*, *supra*, the Supreme Court considered the meaning of the word “accident” in the context of former MCL 257.625a(9), now MCL 257.625a(6)(e). The defendant in *Keskimaki* was observed in his vehicle, which was lawfully parked on the shoulder of the road. Defendant was slumped over the steering wheel, apparently unconscious and breathing erratically. When officers failed to rouse the defendant, he was taken to the hospital, where his blood alcohol content proved to be greater than 0.10. In response to charges of OWI, the defendant moved to suppress evidence of his blood test results, which had been offered into evidence under the accident exception to the implied consent statute. The trial court denied the defendant's motion to suppress, and the defendant appealed. The Supreme Court held that the test results should have been suppressed because no “accident” had occurred. In so holding, the Court declined to propound a general definition

of “accident” for purposes of the statute. Instead, it set forth the following “relevant factors” for determining whether an “accident” has occurred:

“[W]e believe consideration should be given to whether there has been a collision, whether personal injury or property damage has resulted from the occurrence, and whether the incident either was undesirable for or unexpected by any of the parties directly involved. While we do not intend this to be an exhaustive list of factors to be considered, included are those that we believe will appear with frequency in true ‘accidents’ . . .” 446 Mich at 255–256.

Applying the foregoing factors, the Court concluded that the defendant had not been involved in an accident based on the fact that the defendant’s vehicle was found lawfully parked on the shoulder of the road, with its headlights on and its motor running. Tire tracks in the snow indicated that the vehicle had traveled in a straight line following its departure from the road. There was no sign of a collision, no evidence of property damage, and no apparent injury, other than visible intoxication. *Id.*

Admission of the results of the defendant’s blood test was proper where the defendant, who was “incoherent, violent and assaultive, and not acting like a person who was simply under the influence of alcohol,” was taken to a hospital for medical treatment and a doctor ordered the blood test in the course of treating the defendant. *People v Green*, 260 Mich App 392, 409-10 (2004). Applying the “relevant factors” set forth in *Keskimaki*, *supra* at 255-257, the Michigan Court of Appeals concluded that the facts in *Green* supported a finding that the defendant was a driver involved in an “accident” for purposes of MCL 257.625a(6)(e). *Green*, *supra* at 408-09. Unlike the situation in *Keskimaki*, where there was no evidence of personal injury or property damage, there was substantial evidence in *Green*. In *Green*, the defendant’s car was missing a front tire, had damage to a rim, appeared to have traveled across an area of mud and grass, was smoking, and came to rest across several parking spaces. *Green*, *supra* at 409.

2. Urine Tests Taken After an Accident

The Court of Appeals has noted that the accident exception in MCL 257.625a(6)(e) is not applicable to chemical analyses of urine samples. *People v Mayhew*, 236 Mich App 112, 119. The panel in *Mayhew* upheld the trial court’s refusal to suppress results of a urine test that showed the presence of a controlled substance in the body of a defendant charged with felonious driving and other related offenses. After the auto accident giving rise to the charges in this case, the defendant was hospitalized and a search warrant issued for his blood test results. Although the warrant specified only the blood test results, the hospital released the results of a urine test that showed the presence of the active ingredient in marijuana. This evidence was admitted over defendant’s objection at trial. On appeal from his conviction, defendant

asserted that: 1) the urine test results were inadmissible under MCL 257.625a(6)(a) because the more specific provisions governing blood tests in MCL 257.625a(6)(e) created an exception to the subsection (6)(a) provisions; and 2) the search warrant was limited to blood test results, so that the urine test results were beyond its scope.

The Court of Appeals rejected the defendant's first assertion, finding no incompatibility between subsections (6)(a) and (6)(e):

“[S]ubsection (6)(a) clearly allows into evidence chemical analyses that show the amount of alcohol or presence of a controlled substance in a driver's urine. Subsection (6)(e) says nothing whatsoever regarding urine tests and, accordingly, cannot be read as disallowing the admission into evidence of urine tests or otherwise contradicting or presenting a conflict with subsection (6)(a).” *Mayhew, supra* at 119.

**People v Perlos* is discussed at Section 2.4(B)(1), above.

The Court further rejected defendant's assertion that the search warrant for blood test results precluded admission of results of other types of medical tests. The Court found that the defendant had no reasonable expectation of privacy with respect to the results of his urine test; accordingly, he had no standing to challenge the government's action in securing the results from the hospital. *Mayhew, supra* at 119-21, citing *People v Perlos*, 436 Mich 305 (1990).*

3. Defendant Voluntarily Consents to Blood Test

A defendant may voluntarily consent to administration of a blood test prior to arrest on drunk driving charges. In *People v Borchard-Ruhland*, 460 Mich 278, 285 (1999), the Michigan Supreme Court considered the admissibility of a blood sample taken without a warrant prior to the defendant's arrest on charges of OWI causing serious impairment of a body function. Defendant had been taken to a hospital after the accident giving rise to the charges, where a police officer requested her to submit to blood testing. The defendant agreed to the test, but later protested the admission of the test results at her preliminary examination, asserting that she had not been advised of her rights under the implied consent statute, MCL 257.625a(6)(b). She further asserted that a prior valid arrest is mandatory before a motorist may legally consent to blood alcohol testing.

The Supreme Court found that because the defendant was not under arrest at the time the blood test was taken, the implied consent statute did not apply. Accordingly, the officer's failure to advise her of her rights under §625a(6)(b) did not render the test results inadmissible. *Borchard-Ruhland, supra* at 285. Furthermore, the Court held that nothing in the relevant statutory provisions limited the authority of police to request voluntary chemical testing where the defendant was not under arrest.* *Borchard-Ruhland, supra* at 292. The validity of the defendant's consent to the testing, and the admissibility of the test results, is governed by the conventional constitutional standards against unlawful searches and seizures found in the Fourth Amendment to the U.S. Constitution and Const 1963, art 1, §11. *Borchard-Ruhland, supra* at 295. In determining whether the defendant's consent was freely and voluntarily given, the trial court must assess the totality of the circumstances. Knowledge of the right to refuse consent is not a prerequisite to effective consent, and the prosecution need not prove that the person giving consent knew of the right to withhold consent. Knowledge of the right to refuse is but one factor to consider in determining whether consent was voluntary under the totality of the circumstances. *Borchard-Ruhland, supra* at 294.

*The court left for another day the issue whether the implied consent statute limits the authority of police to request voluntary chemical testing where the suspect has been arrested and falls within the ambit of the statute.
Borchard-Ruhland, supra at 292 n 9.

C. Preservation of Evidence Obtained Pursuant to Search Warrant

In *People v Jagotka*, 461 Mich 274 (1999), the Court considered whether destruction of a blood sample taken by warrant was a violation of MCL 780.655(2), which provides that "property and things [seized under a warrant] shall be safely kept by the officer so long as necessary for the purpose of being produced or used as evidence on any trial." The Court found no violation, noting that it was not blood samples that were produced or used as evidence at trial, but instead the results of tests on those blood samples. The safekeeping required by the statute did not apply to blood samples since they would not be produced or used as evidence at trial. Nor did it apply to test results since they are not property seized under §655. 461 Mich at 279.

D. Refusal to Comply with Search Warrant

1. Police Use Force to Obtain a Blood Sample

The Fourth Amendment does not necessarily prohibit police from using pain compliance techniques to obtain dissolvable evidence pursuant to a search warrant. To determine the reasonableness of a particular seizure, the court must balance the nature and quality of the intrusion on a person's Fourth Amendment interests against the countervailing governmental interests at stake. *People v Hanna*, 223 Mich App 466, 471 (1997), citing *Graham v Connor*, 490 US 386, 396 (1989). In *Hanna*, the Court of Appeals held that it was "objectively reasonable" under the circumstances of the case for police to use "Do-Rite sticks" to subdue an uncooperative defendant long enough for a hospital employee to draw blood as provided in a search warrant. The Court found that the police had a strong, legitimate interest in executing the warrant

as soon as possible, and that the laboratory technician could not safely have drawn the defendant's blood unless the defendant ceased his combative conduct. Moreover, the intrusion on the defendant's person was not severe, unnecessary, or unduly intrusive; the defendant was so combative that handcuffs and bed restraints would not have been effective to immobilize him while his blood was drawn. 223 Mich App at 473. The Michigan Supreme Court denied leave to appeal in this case, its majority finding that "[t]he officers used a reasonable amount of force in light of the surrounding facts and circumstances" and that the Court of Appeals had properly applied the "objective reasonableness" test in *Graham v Connor*, *supra*. 495 Mich 1005 (1999).

2. Criminal Prosecution for Resisting or Obstructing an Officer

Persons who refuse to submit to a chemical test pursuant to a valid search warrant may be charged with resisting or obstructing an officer, MCL 750.479. A person's refusal to comply with a search warrant may constitute a violation of MCL 750.479; physical resistance, threats, and abusive language may be relevant in a prosecution under the statute, but none is necessary to establish commission of the offense. *People v Philabaun*, 461 Mich 255, 262–64 (1999). See also *People v Davis*, 209 Mich App 580 (1995) (defendants pulled their arms away from lab technician and threatened to fight).

2.5 Registration Plate Confiscation for Repeat Offenders

*Vehicle immobilization is discussed in Section 2.11(A), below.

MCL 257.904c(1) provides that when a police officer detains the driver of a vehicle for a violation of a law of this state or a local ordinance for which vehicle immobilization is required,* the officer shall immediately confiscate the vehicle's registration plate and destroy it. The officer shall then issue a temporary vehicle registration plate for the vehicle on a form provided by the Secretary of State, and notify the Secretary of State through the law enforcement information network (LEIN). The temporary plate is valid until the violation is dismissed or adjudicated. MCL 257.904c(2). The Secretary of State shall not issue a registration for the vehicle until the violation is adjudicated or the vehicle is lawfully transferred to another person. MCL 257.219(3).

A. Offenses Where Plate Confiscation Is Required

Registration plate confiscation is required upon detention for the following Vehicle Code §625 and §904 offenses for which immobilization is mandatory under MCL 257.904d(1)–(2):

- Any violation of §625(4) or (5) (OWI or OWVI causing death or serious impairment of a body function).

- Any violation of §904(4) or (5) (DWLS causing death or serious impairment of a body function).
 - A moving violation committed while driving with a suspended/revoked license and occurring within seven years of two or more prior suspensions, revocations, or denials imposed under §904(10), (11), or (12) (which impose additional licensing sanctions on persons who commit moving violations while driving with a suspended/revoked license).
 - A violation of §625(1), (3), (7) or (8) (OWI, OWVI, or child endangerment) within seven years after one prior conviction or within ten years after two or more prior convictions of any of the following offenses under a Michigan law, or under a substantially corresponding local ordinance or law of another state:*
- OWI under §625(1).
 - OWVI under §625(3).
 - OWI or OWVI causing death or serious impairment of a body function under §625(4)–(5).
 - Zero tolerance violations under §625(6); however, only one such conviction may count as a prior conviction for purposes of plate confiscation.
 - Child endangerment under §625(7).
 - OWI (operating with any amount of certain drugs in the body) under §625(8).
 - Operating a commercial motor vehicle with an unlawful bodily alcohol content, under §625m.
 - Former §625b (previously provided penalties for OWVI).
 - A violation of any prior enactment of §625, including former subsections (1) and (2), which penalized operating while intoxicated or with an unlawful blood-alcohol content, respectively.
 - Negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.

*The listed prior convictions are taken from Vehicle Code §904d(8).

Note: Registration plate confiscation under the foregoing provisions should be distinguished from plate cancellation under MCL 257.904(3). That statute authorizes the Secretary of State to cancel a vehicle's registration plate upon receipt of notice from a police officer that the driver has committed a first or second violation of Vehicle Code §904(1) or (2) (DWLS or allowing someone to drive with a suspended/revoked license). This sanction is subject to two exceptions:

- For a first violation, the vehicle was stolen or used with the permission of a person who did not knowingly permit an unlicensed driver to operate the vehicle.
- For a violation occurring after a prior conviction, the vehicle was stolen.

See Section 4.1 of this volume on offenses under Vehicle Code §904(1) or (2).

B. Vehicles Subject to Plate Confiscation Requirements

Under §904c, the registration plate is confiscated from the offending vehicle whether or not the vehicle is registered to its driver.* However, under MCL 257.904d(7), the following vehicles are exempt from registration plate confiscation under §904c:

- Rental vehicles. Because MCL 257.37(a) defines a vehicle's "owner" as someone having exclusive use of a vehicle for more than 30 days, the exception for rented vehicles applies only to rental agreements for 30 days or less.
- Vehicles registered in other states.
- Vehicles owned by the federal government, the State of Michigan, or a local unit of government of Michigan.
- Vehicles not subject to registration under §216 of the Motor Vehicle Code.

Note: An officer who detains the driver of a vehicle exempt from plate confiscation will still cite the driver for the appropriate violation.

C. Operating a Vehicle with a Temporary Registration Plate

Under MCL 257.904c(2), the temporary registration plate remains valid until:

- The charges against the person are dismissed;
- The person pleads guilty or nolo contendere to the charges; or
- The person is found guilty of or is acquitted of the charges.

The Secretary of State will not issue a registration for a vehicle with a temporary registration plate until the violation resulting in the issuance of the temporary plate is adjudicated or the vehicle is transferred to a person subject to payment of use tax. MCL 257.219(3).

*This encourages the driver to appear in court to adjudicate the matter so the vehicle owner can obtain a new metal registration plate.

A temporary registration plate will also become invalid if the underlying registration expires before any of the above events take place. In this case, the temporary plate may be renewed at a Secretary of State branch office.

The following restrictions apply to vehicles with temporary registration plates affixed pursuant to §904c:

- Only a licensed and sober driver may drive the vehicle.
- The vehicle owner may purchase and register another vehicle under his or her name. The owner may not, however, transfer the temporary registration plate to the other vehicle.
- The vehicle may be sold, but not to anyone exempt from use tax under MCL 205.93(3)(a) without a court order. MCL 257.904e(2). Transfers exempt from use tax under MCL 205.93(3) occur when the transferee or purchaser has one of the following relationships to the transferor: spouse, mother, father, brother, sister, child, stepparent, stepchild, stepbrother, stepsister, grandparent, grandchild, legal ward, or a legally appointed guardian with a certified letter of guardianship.

2.6 Arraignment/Pretrial Procedures

This section addresses pretrial proceedings that are unique to criminal cases arising under Vehicle Code §625 and §904. For a more complete discussion of pretrial proceedings in criminal cases generally, see Hummel, *Misdemeanor Arraignments & Pleas* and *Felony Arraignments in District Court—Revised Edition* (MJJ, 2004). For general information about magistrates' duties in traffic cases, see Michigan Judicial Institute, *New Magistrate Traffic Adjudication Manual* (2003).

A. District Court Magistrate's Authority to Act in Cases Arising Under the Vehicle Code

MCR 6.615(C)(2) provides that an arraignment in a misdemeanor traffic case may be conducted by a district court judge or a magistrate acting as authorized by statute and by the judges of the district. In no event may a magistrate's authority exceed that conferred by his or her district judge. MCR 4.401(B).

Magistrates have statutory authority to carry out the following pretrial functions in criminal cases generally:

- Conduct a first appearance in all cases, and accept written demand or waiver of preliminary exam, and demand or waiver of jury trial. MCL 600.8513(1).
- Fix bail and accept bond in all cases. MCL 600.8511(e).

- Approve and grant petitions for the appointment of counsel for indigent defendants accused of any misdemeanor punishable by imprisonment for not more than one year, or an ordinance violation punishable by imprisonment. MCL 600.8513(2)(a).
- Accept a plea of guilty or no contest, and impose sentence for any misdemeanor or ordinance violation punishable by a fine only and not imprisonment by the terms of the statute creating the offense. MCL 600.8512a(b).

In cases involving Vehicle Code violations, magistrates may arraign defendants, accept guilty and no contest pleas, and impose sentence where the maximum punishment does not exceed 93 days in jail and/or a fine. *However*, this authority *does not extend* to cases involving a violation of MCL 257.625, MCL 257.625m, or a substantially corresponding local ordinance. For these drunk driving offenses, the magistrate has limited jurisdiction to arraign the defendant and set bond. MCL 600.8511(b).

B. Holding or Releasing a Defendant Prior to Arraignment

MCL 780.581–.582 contain interim bond provisions for defendants arrested with or without a warrant for misdemeanor or ordinance violations punishable by imprisonment for not more than one year and/or a fine. These statutes require the arresting officer to take the defendant without unnecessary delay to the most convenient magistrate of the county where the offense was committed to answer the complaint. If a magistrate is not available or immediate trial cannot be had, the person arrested may be released upon payment of an interim bond to the arresting officer or to the deputy in charge of the county jail. The amount of the bond shall neither exceed the maximum possible fine nor be less than 20% of the minimum possible fine for the offense for which the defendant was arrested. MCL 780.581(2).

If the defendant is under the influence of alcohol and/or a controlled substance, the arresting officer may hold the defendant in a holding cell or lockup until he or she is in a proper condition to be released, or until the next session of court. MCL 780.581(3)–(4).

Note: The Michigan Attorney General has opined that the provisions of MCL 780.581(3) apply to a person under 21 years of age arrested for violating Vehicle Code §625(6) (zero tolerance violation). OAG No. 6824, December 1, 1994.

MCL 257.727 similarly provides that if a person is arrested without a warrant for certain drunk driving offenses, the arresting officer shall, without unreasonable delay, take the person before the nearest or most accessible magistrate within the judicial district where the alleged offense occurred, as provided by MCL 764.13. The arresting officer shall present to the magistrate a complaint stating the charges. These requirements apply to the following drunk driving offenses:*

- OWI under Vehicle Code §625(1).
- OWVI under Vehicle Code §625(3).
- OWI or OWVI causing death or serious impairment of a body function under Vehicle Code §625(4)–(5).
- Zero tolerance violations under Vehicle Code §625(6).
- Child endangerment under Vehicle Code §625(7).
- OWI (operating with the presence of drugs) under Vehicle Code §625(8).*
- Violation of a local ordinance substantially corresponding to Vehicle Code §625(1), (3), (6), or (8).*

An exception to the requirements of MCL 764.13 exists in cases where the person is arrested without a warrant for a misdemeanor or ordinance violation punishable by a maximum 93 day term of imprisonment and/or a fine. In these cases, MCL 764.9c(1) permits the arresting officer to issue the person an appearance ticket and release him or her from custody, instead of taking the person before a magistrate and filing a complaint as provided in MCL 764.13.

C. Time Requirements for Processing Misdemeanor Drunk Driving Cases

MCL 257.625b(1)–(3) sets forth time limits for arraignments, pretrial conferences, and final adjudications in cases involving the following misdemeanor drunk driving offenses:

- OWI under Vehicle Code §625(1).
- OWVI under Vehicle Code §625(3).
- Zero tolerance violations under Vehicle Code §625(6).
- Child endangerment under Vehicle Code §625(7).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under Vehicle Code §625m.

*In addition to the listed drunk driving offenses, the statutes' requirements apply to persons arrested for negligent homicide or reckless driving, and to persons who do not have immediate possession of a driver's license.

*Effective May 3, 2004. 2004 PA 62.

*2004 PA 62.

*Effective May 3, 2004. 2004 PA 62.

*2004 PA 62.

- OWI (operating with the presence of drugs) under Vehicle Code §625(8).*
- Violation of a local ordinance substantially corresponding to Vehicle Code §625(1), (3), (6), (8), or §625m.*

The time limits set forth in §625b(1)–(3) do not apply to the foregoing offenses when they are joined with a felony charge. The §625b(1)–(3) time limits are also inapplicable to the following offenses punishable as felonies:

- OWI under Vehicle Code §625(1).
- OWVI under Vehicle Code §625(3).
- Child endangerment under Vehicle Code §625(7).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under Vehicle Code §625m.
- OWI (operating with the presence of drugs) under Vehicle Code §625(8).*

*Effective May 3, 2004. 2004 PA 62.

The §625b(1)–(3) time limits are as follows:

Arraignment: MCL 257.625b(1) requires that the defendant be arraigned not more than 14 days after the arrest for the violation, or if an arrest warrant is issued or re-issued, not more than 14 days after the issued or re-issued arrest warrant is served, whichever is later.

Pretrial conference: MCL 257.625b(2) requires the court to schedule a pretrial conference between the prosecutor, the defendant, and the defendant’s attorney. The court shall order the defendant to attend the conference, and may accept a plea by the defendant at its conclusion. The pretrial conference shall be held not more than 35 days after the person’s arrest for the violation, or, if an arrest warrant is issued or re-issued, not more than 35 days after the issued or re-issued arrest warrant is served, whichever is later. The statute extends this period to 42 days if the court only has one judge who sits in multiple locations in the district. The conference may be adjourned upon the motion of a party for good cause shown. Not more than one adjournment shall be granted a party, and the length of an adjournment shall not exceed 14 days.

Final adjudication: MCL 257.625b(3) requires the court to finally adjudicate the above-referenced misdemeanor drunk driving offenses within 77 days after the defendant is arrested for the violation, or, if an arrest warrant is issued or re-issued, not more than 77 days after the date the issued or re-issued arrest warrant is served, whichever is later. This time limitation does not apply if a delay is attributable to:

- The unavailability of the defendant or a witness;
- The unavailability of material evidence;

- An interlocutory appeal; or
- Exceptional circumstances.

The §625b(3) time limit is not excused by delays attributable to docket congestion. A final adjudication may be by a plea of guilty or no contest, by entry of a verdict, or by other final disposition.

Failure to comply with the §625b(1)–(3) time limits shall not result in dismissal of the case or imposition of any other sanction.

D. Charging Documents

Offenses carrying a maximum 93 day term of imprisonment and/or a fine may be charged using a traffic citation. Other offenses, however, must be processed on a complaint and warrant. See MCL 257.727c(3), MCL 764.1e and MCR 6.615(A).

In charging repeat offenders, prosecuting attorneys must include a statement listing the defendant's prior convictions on the complaint and information whenever they seek the following criminal penalties or vehicle sanctions under the Vehicle Code:

- Enhanced sentences for repeat drunk driving offenders under §625. MCL 257.625(15).
- Enhanced sentences for repeat offenders driving with a suspended or revoked license under §904. MCL 257.904(8).
- Vehicle immobilization for drunk driving or DWLS offenses under §904d. MCL 257.625(15) and MCL 257.904(8).
- Vehicle forfeiture for specified drunk driving offenses under §625n. MCL 257.625(15).

Prior to a person's arraignment before a district court magistrate or judge on a charge of violating MCL 257.904, subsection (14) of that statute provides that the arresting officer shall obtain the person's driving record from the Secretary of State and shall furnish the record to the court. (The driving record may be obtained from the Secretary of State's computer information network.)

E. Guilty and Nolo Contendere Pleas

The following discussion addresses issues that commonly arise in taking guilty and nolo contendere pleas in drunk driving cases. For detailed information on plea-taking generally, see Hummel, *Misdemeanor Arraignments & Pleas and Felony Arraignments in District Court—Revised Edition* (MJJ, 2004).

1. Prerequisites for Accepting a Plea — Advice to the Defendant

In general, the requirements for accepting a guilty or nolo contendere plea are contained in MCR 6.302 (cases cognizable in circuit court) and MCR 6.610(E) (cases cognizable in district court). Under these rules, the court must be convinced that the defendant's plea is understanding, voluntary, and accurate. The defendant must also be informed of his or her due process rights and of the consequences of the plea.

Effective September 1, 2002, MCR 6.302(B) was amended in part to eliminate the requirement that a court advise the defendant of the circumstances in which it has discretion to appoint appellate counsel. Thus, former MCR 6.302(B)(7) has been deleted. The advice formerly contained in MCR 6.302(B)(7) remains in MCR 6.425(E)(2)(c), the court rule governing the right to appeal and appointment of appellate counsel.

*Effective May 3, 2004. 2004 PA 62.

For guilty or nolo contendere pleas arising under Vehicle Code §625 or a local ordinance substantially corresponding to Vehicle Code §625(1), (2), (3), (6), or (8), MCL 257.625b(4) also provides that the court must advise the accused of the maximum possible term of imprisonment and the maximum possible fine that may be imposed for the violation.* MCR 6.610(E)(3)(a) and 6.302(B)(2) contain a similar requirement. Furthermore, the court must advise the defendant that the maximum possible license sanction that may be imposed will be based upon the defendant's master driving record maintained by the Secretary of State. Section 625b(4) does not require the court to inform the defendant of the specific licensing sanctions that apply to the violation in question; however, the Advisory Committee for this chapter of the Benchbook recommends that courts do so as a best practice prior to accepting a guilty plea to a violation of §625.

*MCR 6.610(D)(3) allows waiver of an attorney by "a writing that is made a part of the file or orally on the record."

People v Asquini, 227 Mich App 702, 707 (1998), is instructive with regard to the manner in which a court informs a defendant of the right to appointed counsel before accepting a guilty plea. In taking the two OWI pleas at issue in that case, the trial court was deemed to have obtained the defendant's intelligent waiver of the right to counsel by eliciting his affirmative response to the question: "[Do you understand] you're waiving the right to have an attorney appointed for you if you can't afford one?" 227 Mich App at 710. While holding that this question adequately informed this college-educated defendant of the right to court-appointed counsel, the Court of Appeals noted that "[w]e do regard the district court's manner of informing defendant of his right to counsel as less than ideal. We need not express an opinion regarding whether the district court's questioning would have provided the requisite information to allow a defendant of less than average intellectual ability to waive intelligently the right to counsel." 227 Mich App at 712 n 4. To resolve possible ambiguities regarding a defendant's waiver of the right to counsel, the Court of Appeals recommended that a written advice-of-rights form* signed by the defendant could be marked as an exhibit and made part of the record. *Id.*

2. Use of Uncounselled Conviction to Enhance Subsequent Charge or Sentence

Constitutionally infirm convictions may not be considered in subsequent prosecutions for enhancement purposes, but a valid waiver of a defendant's right to counsel need not be shown where no right to counsel existed in relation to the offense charged. *People v Richert (After Remand)*, 216 Mich App 186, 195 (1996). In addition to other requirements, before accepting a defendant's plea of guilty or no contest:

“The court shall inform the defendant of the right to the assistance of an attorney. If

“(a) the offense charged requires on conviction a minimum term in jail, or

“(b) the court determines that it might sentence the defendant to jail,

“the court shall inform the defendant that if the defendant is indigent he or she has the right to an appointed attorney.

“A subsequent charge or sentence may not be enhanced because of this conviction unless a defendant who is entitled to appointed counsel is represented by an attorney or waives the right to an attorney.” MCR 6.610(E)(2).

MCR 6.610(E) was amended after the Michigan Supreme Court's decision in *People v Reichenbach*, 459 Mich 109 (1998). In *Reichenbach*, the defendant asserted that his 1989 plea-based and counseless misdemeanor conviction could not be used to enhance a later conviction because he had neither been informed in 1989 of his right to *appointed* counsel nor had he waived his right to counsel before pleading guilty. *Id.* at 115. In deciding that the defendant's 1989 conviction was properly used to enhance a later charge despite the absence of counsel, the Michigan Supreme Court adopted the United States Supreme Court's decisions in *Argersinger v Hamlin*, 407 US 25 (1972), and *Scott v Illinois*, 440 US 367 (1979).

Argersinger decided the fundamental principle that regardless of the severity of the offense charged, an individual could not be deprived of his or her liberty without having had the assistance of counsel. *Argersinger*, *supra* at 40. The *Argersinger* Court concluded that wherever “actual imprisonment” was the result, the defendant must receive the benefit of counsel. *Id.* The *Scott* Court affirmed *Argersinger*'s “actual imprisonment” distinction and emphasized the difference between “actual imprisonment” and the “mere threat of imprisonment.” *Scott*, *supra* at 373–374. The *Reichenbach* Court concluded:

“The Michigan Constitution does not afford indigent misdemeanor defendants the right to appointed counsel

absent ‘actual imprisonment’ under *Argersinger* and *Scott*.” *Reichenbach, supra* at 118.

For purposes of the actual sentence imposed after an indigent defendant’s conviction, the United States Supreme Court eliminated the significance of “actual imprisonment” versus “threatened” imprisonment. Following the Court’s decision in *Alabama v Shelton*, 535 US 654 (2002), not only is an indigent defendant who is not represented by counsel and who has not waived the right to appointed counsel exempt from receiving a sentence of “actual imprisonment,” a *probated* or *suspended* sentence of imprisonment is similarly invalid under the same circumstances.

In *Shelton*, the United States Supreme Court implicitly disagreed with the Michigan Supreme Court’s reasoning in *Reichenbach*. The Court affirmed the Alabama Supreme Court’s conclusion (and the Alabama Court’s explicit disagreement with *Reichenbach*) that no real distinction could exist between “actual imprisonment” and probated or “threatened” imprisonment for purposes of an indigent defendant’s right to counsel. *Shelton, supra* at 659. Because an unrepresented indigent defendant who had not waived his or her right to counsel could not be made to serve any part of a “probated” or “suspended” sentence for the same reason that no term of “actual” imprisonment could be imposed, any distinction was illusory. *Id.* The United States Supreme Court held that a defendant has a constitutional right to counsel when he or she receives a probated or suspended sentence of imprisonment. *Id.* at 674. In other words, an indigent defendant who is not represented by counsel and who has not waived the right to appointed counsel may not be given a probated or suspended sentence of imprisonment.

In *People v Haynes*, 256 Mich App 341, 342 (2003), the Court of Appeals upheld the use of a prior uncounselled juvenile adjudication for a “zero tolerance” violation for the purposes of enhancement. The Court held that “a trial court may consider prior juvenile delinquency adjudications obtained without the benefit of counsel in determining a defendant’s sentence where the prior adjudication did not result in imprisonment.” *Id.* at 348-49. The Court reaffirmed existing case law permitting use of prior uncounselled misdemeanor convictions for enhancement where counsel was not required for the prior offenses or where the prior adjudications did not result in imprisonment. *Reichenbach, supra*; *People v Daoust*, 228 Mich App 1, 17-19 (1998).

3. Collateral Attack of Guilty Plea to Prior Offense

A “collateral attack” is a constitutional challenge to a plea raised other than by initial appeal of the conviction in question. *People v Ingram*, 439 Mich 288, 291 n 1 (1992). “A collateral attack on a prior conviction underlying a present charge may not be made after a defendant’s plea of guilty to the present charge is accepted.” *People v Roseberry*, 465 Mich 713, 723 (2002). In *Roseberry*, the defendant pled guilty to OWI-3d and, after sentencing, moved to vacate his conviction and sentence, claiming that the two predicate convictions were obtained in violation of his right to counsel. The Michigan Supreme Court concluded that the defendant’s guilty plea extinguished his right to collaterally attack his prior convictions. *Id.* at 717–19.*

*See, however, MCR 6.310(B) (withdrawal of plea before sentencing).

A conviction found constitutionally infirm on timely collateral attack may not be used for purposes of sentence enhancement. See *Matheson v Sec’y of State*, 170 Mich App 216, 220 (1988).

The validity of a guilty plea may only be collaterally attacked if the plea was taken in violation of the defendant’s right to counsel. Thus, a plea may not be collaterally attacked if the defendant: 1) was represented by an attorney when the plea was entered; or 2) intelligently waived the right to counsel, including the right to court-appointed counsel. Where the foregoing requirements are met, the failure of the plea-taking court to adhere to applicable plea-taking requirements does not support a defendant’s challenge to the plea by collateral attack. *People v Ingram*, *supra* at 293–295.

The foregoing principles were applied in *People v Asquini*, 227 Mich App 702, 704 (1998), where the defendant sought to quash charges of OWI-3d by asserting that his two prior OWI convictions were constitutionally infirm. Defendant asserted that when he pled guilty to the two prior offenses, he had not been represented by counsel, had not been properly advised of the right to counsel, and had not knowingly and intelligently waived his right to counsel. The Court of Appeals disagreed, holding that both prior convictions could be used as the basis for the OWI-3d charge. Citing *People v Ingram*, *supra*, the Court noted that the *Asquini* defendant had intelligently waived his right to counsel in both prior proceedings, so that the prior pleas were not subject to collateral attack. 227 Mich App at 717.

The Michigan Supreme Court has held that a long-delayed direct appeal from a plea-based conviction of OWI-2d will be deemed collateral and subjected to the restrictions on attack articulated in *People v Ingram*, *supra*. *People v Ward*, 459 Mich 602 (1999). In *Ward*, the defendant moved to set aside a guilty plea to OWI-2d 14 months after it was entered in district court. This motion was brought only after the defendant had been charged with OWI-3d, and was intended to extricate the defendant from the sentence enhancements that would result from the prior conviction. At the plea-taking on the OWI-2d charge, the district judge had accepted defendant’s plea without observing the requirements of MCR 6.610(E). Specifically, the judge failed to question the defendant to determine whether the plea was understanding, voluntary, and

accurate. The judge also failed to inform the defendant of the maximum sentence or of the rights he gave up by offering the plea. The prosecutor was not present at the plea-taking, and defendant's retained counsel did not bring the procedural defects to the court's attention, thus preserving the possibility of setting aside the plea if the defendant were ever charged with another OWI offense. The Supreme Court deemed the defendant's long-delayed motion a "collateral attack," and held that "because the validity of the plea was contested merely out of subsequent sentencing concerns, defendant's ability to directly attack his OUIL 2d conviction was foreclosed when he was arrested and charged with OUIL 3d." 459 Mich at 612.

Note: The difficulties in *Ward* resulted from the lack of time limits for bringing a motion to withdraw a plea in district court and filing an appeal from a denial of such a motion pursuant to MCR 6.610(E)(7) and MCR 7.103(B). To address these difficulties, the *Ward* Court published for comment proposed amendments to MCR 6.610(E)(7)(a) and 7.103(B)(6) to clarify the time limits for challenging plea-based convictions in district court. Amendments based on those proposed were adopted, except that the proposed 12-month time limit on the post-judgment filing of motions to withdraw pleas and appeals concerning such motions was changed to a six-month time limit. The effective date of the amendments was September 1, 2000.

The six-month time limit established in the amendments to MCR 6.610(E)(7) and MCR 7.103(B) for bringing motions to withdraw pleas in district court and for appealing denials of such motions may be applied retroactively. In *People v Clement*, 254 Mich App 387, 388 (2002), the defendant was charged with OWI-3d. After being bound over on the charge, the defendant moved, on the basis of deprivation of counsel, to set aside a prior plea-based conviction for impaired driving entered in 1995. The district court granted that motion, and defendant thereafter brought a motion in circuit court to quash the OWI-3d charge. The circuit court denied the motion, finding that the district court's order setting aside the 1995 conviction was invalid since defendant waited too long after being sentenced to file his motion. On appeal, defendant argued that the six-month deadline for challenging guilty pleas in district court should not apply to his case because the amendments to MCR 6.610(E)(7)(a) and MCR 7.103(B)(6), which established the six-month time limit, did not take effect until September 1, 2000, approximately five years after the date of the prior conviction. The Court of Appeals affirmed the circuit court's denial of defendant's motion to quash, holding that the defendant's collateral attack was time-barred under the rules. *Id.* at 396. In so holding, the Court relied on the rules' staff comments, which unambiguously state that the six-month time limit for judgments entered before the effective date of the amendment (September 1, 2000) is to commence on the amendment's effective date. The Court explained its rationale as follows:

"The amendments to MCR 6.610(E)(7)(a) and MCR 7.103(B)(6) make clear the Supreme Court's intention to

foreclose unequivocally appeals of district court guilty pleas brought over six months after entry of the judgment. Moreover, the interplay of [*People v Ward*, 459 Mich 602 (1999)], MCR 6.610(E)(7)(a), and MCR 7.103(B)(6) convinces us that the staff comment[s] to the [foregoing court rules] are entirely correct: A defendant who pleaded guilty to an offense in district court before the effective date of the amendments had only six months from September 1, 2000 to challenge the plea. Any other interpretation would contravene the *Ward* Court's strong disavowal of delayed challenges to guilty pleas and the Court's corresponding intent to limit the time period for challenging a plea-based conviction. Defendant missed the six-month deadline in the instant case, and therefore the district court erroneously allowed defendant to withdraw his guilty plea in the 1995 case." *Id.* at 393.

Apart from its reliance on the foregoing court rules, the Court of Appeals also rested its opinion on the explicit holding of *Ward, supra*, which foreclosed collateral attacks on prior convictions when made on the basis of subsequent sentencing considerations:

"The instant case presents analogous facts to those at issue in *Ward*. Indeed, defendant waited over five years to challenge his guilty plea, and he did so only after being charged with OUIL 3d. Therefore, a challenge by the prosecutor to the district court's order of dismissal in defendant's 1995 case would have been meritorious under *Ward*, even disregarding the amendments to [the foregoing court rules]." *Id.* at 394 n 2.

Finally, the Court rejected defendant's ex post facto argument, finding it so cursory that it did not even have to address it. However, the Court stated that, if it were to address the issue, it would find no constitutional violation since the court rule amendments were procedural and "did not criminalize a theretofore innocent act, did not aggravate a crime previously committed, did not provide greater punishment for a crime, and did not change the proof necessary for a conviction." *Id.* at 395.

4. Effect of Constitutional Infirmary on Licensing Sanction

The Court of Appeals has held that a constitutionally infirm OWI conviction that has not been appealed or vacated may be used to form the basis of an administrative action revoking a person's driving privileges. *Broadwell v Dep't of State*, 213 Mich App 306, 308–309 (1995); *Matheson v Sec'y of State*, 170 Mich App 216, 221 (1988). The Court in *Matheson* reasoned that "the revocation or suspension of a person's driving privileges by the Secretary of State is not enhancement of a punishment against the person, but rather is

an administrative action aimed at the protection of the public.” 170 Mich App at 220–221.

5. Effect of Nolo Contendere Pleas in Subsequent Actions

A conviction based on a plea of nolo contendere may be used to enhance a subsequent charge. MCL 257.910 provides:

“A conviction based on a plea of nolo contendere shall be treated in the same manner as a conviction based on a plea of guilty.”

See also MCL 257.8a(a), which defines “conviction” to include a plea of nolo contendere.

6. Limitations on the Use of Evidence of a Plea in Subsequent Actions

A plea-based conviction used to enhance a subsequent charge should be distinguished from evidence of the plea itself. Use of evidence of the plea is limited by MRE 410, which provides:

“Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

“(1) A plea of guilty which was later withdrawn;

“(2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;

“(3) Any statement made in the course of any proceedings under MCR 6.302* or comparable state or federal procedure regarding either of the foregoing pleas; or

“(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

“However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement

*MCR 6.302 governs pleas of guilty and nolo contendere in criminal cases cognizable in circuit court.

was made by the defendant under oath, on the record and in the presence of counsel.”

7. Restrictions on Plea Bargains Involving the Zero Tolerance Provisions of the Vehicle Code

The Vehicle Code contains the following restrictions on plea bargains involving the zero tolerance provisions of MCL 257.625(6):

- **Plea to Zero Tolerance Violation Prohibited**

Under MCL 257.625(16), persons charged with any of the following violations may not enter a plea of guilty or nolo contendere to a zero tolerance charge in exchange for dismissal of the original charge:

- OWI under §625(1).
- OWVI under §625(3).
- OWI or OWVI causing death under §625(4).
- OWI or OWVI causing serious impairment of a body function under §625(5).
- Child endangerment under §625(7).
- OWI under §625(8).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content, under §625m.

MCL 257.625(16) does not prohibit the court from dismissing the charge upon the prosecutor’s motion.

- **Restrictions for Defendants Charged with Zero Tolerance Violation**

A court shall not accept a plea of guilty or nolo contendere for a violation of MCL 257.624a (governing transporting or possessing alcohol in an open container) from a person charged solely with a zero tolerance violation under Vehicle Code §625(6). MCL 257.624a(3).

F. Discovery

A trial court may grant a motion for discovery on two different grounds. First, MCR 6.201 makes certain discovery mandatory in felony cases. Second, in a criminal case, the trial court has the discretion to grant additional discovery. *People v Valeck*, 223 Mich App 48, 50 (1997).

1. Mandatory Discovery

MCR 6.201(A) requires a party to provide the following information to all other parties upon request:

“(1) the names and addresses of all lay and expert witnesses whom the party intends to call at trial;

“(2) any written or recorded statement by a lay witness whom the party intends to call at trial, except that a defendant is not obliged to provide the defendant’s own statement;

“(3) any report of any kind produced by or for an expert witness whom the party intends to call at trial;

“(4) any criminal record that the party intends to use at trial to impeach a witness;

“(5) any document, photograph, or other paper that the party intends to introduce at trial; and

“(6) a description of and an opportunity to inspect any tangible physical evidence that the party intends to introduce at trial. On good cause shown, the court may order that a party be given the opportunity to test without destruction such tangible physical evidence.”

In *Valeck, supra*, the defendant sought to inspect a Datamaster breath test instrument that police had used to test his blood alcohol level. The Court of Appeals held that MCR 6.201(A)(6) (compelling inspection of “any tangible physical evidence that [a] party intends to introduce at trial”) did not entitle the defendant to inspect the Datamaster: “The instrument itself is not ‘tangible physical evidence’ within the plain meaning of that term. The physical evidence here was the defendant’s breath, not the instrument used to test it.” 223 Mich App at 51.

MCR 6.201(B) requires the prosecution to provide the following information to each defendant upon request:

“(1) any exculpatory information or evidence known to the prosecuting attorney;

“(2) any police report concerning the case, except so much of a report as concerns a continuing investigation;

“(3) any written or recorded statements by a defendant, codefendant, or accomplice, even if that person is not a prospective witness at trial;

“(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and

“(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.”

There is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by the defendant’s right against self-incrimination. MCR 6.201(C)(1). However, records subject to privilege may be subject to discovery after an in-camera inspection of the records, upon a demonstration of the defendant’s good faith belief, grounded in articulable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense. MCR 6.201(C)(2).

2. Discovery in the Court’s Discretion

The Michigan Supreme Court has “long entrusted the question of discovery in criminal cases to the discretion of the trial court.” *People v Lemcool*, 445 Mich 491, 497 (1994). In reviewing a trial court’s discovery order for an abuse of discretion, the Court of Appeals has inquired whether the order furthers the purposes of discovery, which the Court of Appeals has articulated as follows:

“The purpose of broad discovery is to promote the fullest possible presentations of the facts, minimize opportunities for falsification of evidence, and eliminate vestiges of trial by combat . . . [D]isclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice.” *People v Valeck*, 223 Mich App 48, 51–52 (1997), citing *People v Wimberly*, 384 Mich 62, 66 (1970).

In *Valeck, supra*, the defendant moved to inspect a Datamaster breath test instrument that police had used to test his blood alcohol level. The defendant sought such discovery to support his challenge to the reliability of Datamaster breath test instruments generally. The Court of Appeals held that the trial court’s order granting the defendant’s motion had been an abuse of discretion because it did not further the purposes of discovery. The panel reasoned that the defendant had already contacted an expert familiar with the instrument, and so did not need to inspect the particular instrument used in his case to gain access to the information he needed to support his challenge. 223 Mich App at 52.

2.7 Procedural Issues Arising at Trial

The following discussion addresses procedural issues that arise in the trial of certain offenses arising under Vehicle Code §625. See also Section 2.6(C),

above, for a discussion of the 77-day time limit for final adjudication of specified misdemeanor drunk driving offenses.

A. No Right to Jury Trial on Prior Convictions Under §625

In repeat drunk driving cases, a prior conviction shall be established at sentencing by one or more of the following:

- An abstract of conviction.
- A copy of the defendant's driving record.
- An admission by the defendant.

MCL 257.625(17). A jury has no role in determining whether the defendant has been convicted of prior drunk driving offenses. *People v Weatherholt*, 214 Mich App 507, 512 (1995).

B. Findings and Reporting Requirements in Cases Involving Driving While Under the Influence of or While Impaired Due To a Controlled Substance

Special findings are required in OWI and OWVI cases arising under Vehicle Code §625(1) and (3) (or a substantially corresponding local ordinance) in which the defendant was under the influence of or impaired by a controlled substance. The requirement for special findings can be met by a special jury verdict or a finding by the court.

Under MCL 257.625(18), the court requires the jury to return a special verdict in the form of a written finding as to whether a defendant charged with violating §625(1) was under the influence of a controlled substance or a combination of intoxicating liquor and a controlled substance. Under MCL 257.625(19), the court requires the jury to return a special verdict in the form of a written finding as to whether, due to the consumption of a controlled substance or a combination of alcoholic liquor and a controlled substance, a defendant charged with violating §625(3) was visibly impaired at the time of the violation. If the court convicts the defendant without a jury or accepts a plea of guilty or nolo contendere, the court shall make the special finding.

The special verdict is not required if a jury is instructed to make a finding solely as to either of the following:

- Whether the defendant was under the influence of a controlled substance or a combination of intoxicating liquor and a controlled substance at the time of the violation; or
- Whether the defendant was visibly impaired due to his or her consumption of a controlled substance or a combination of

intoxicating liquor and a controlled substance at the time of the violation. MCL 257.625(20).

If the jury or court finds that the defendant operated a motor vehicle under the influence of or while impaired due to the consumption of a controlled substance or a combination of intoxicating liquor and a controlled substance, MCL 257.625(21) requires the court to do both of the following:

- Report the finding to the Secretary of State; and
- Forward to the Department of State Police a record that specifies the penalties imposed by the court, including any prison term and any sanction imposed under §625n (on vehicle forfeiture) or §904d (on vehicle immobilization). Forms for this purpose are prescribed by the State Court Administrator.
- The records forwarded to the Department of State Police are public record and must be retained for not less than seven years. MCL 257.625(22).

2.8 Evidentiary Questions — Chemical Tests

This section discusses various questions that arise in drunk driving cases with respect to the admission of chemical tests into evidence at trial.

A. Admissibility of Preliminary Chemical Breath Analysis Results

The results of a preliminary chemical breath analysis* administered pursuant to MCL 257.625a(2) are admissible for certain purposes in an administrative hearing or in a criminal prosecution for one of the following crimes listed in Vehicle Code §625c(1):

- OWI under §625(1).
- OWVI under §625(3).
- OWI or OWVI causing death or serious impairment of a body function under §625(4) or (5).
- Zero tolerance violations under §625(6).
- Child endangerment under §625(7).
- OWI (operating with the presence of drugs) under §625(8).
- Operating a commercial motor vehicle and refusing to submit to a preliminary chemical breath analysis under §625a(5).

*Section 2.1(B), above, addresses the circumstances where police may require a preliminary chemical breath analysis.

- Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m.
- Violation of a local ordinance substantially corresponding to §625(1), (3), (6), or (8), §625a(5), or §625m.
- Felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, if the police had reasonable grounds to believe the driver was operating the vehicle in violation of §625.

The purposes for which the results of the preliminary chemical breath analysis are admissible are listed in MCL 257.625a(2)(b) as follows:

- To assist the court or hearing officer in determining a challenge to the validity of an arrest.
- As evidence of the defendant's breath alcohol content, if offered by the defendant to rebut testimony elicited on cross-examination of a defense witness that the defendant's breath alcohol content was higher at the time of the charged offense than when a chemical test was administered pursuant to the implied consent statute (Vehicle Code §625c).
- As evidence of the defendant's breath alcohol content, if offered by the prosecutor to rebut testimony elicited on cross-examination of a prosecution witness that the defendant's breath alcohol content was lower at the time of the charged offense than when a chemical test was administered pursuant to the implied consent statute (Vehicle Code §625c).

B. Admissibility of Chemical Tests Taken Under the Implied Consent Statute

*See Section 2.3, above, on chemical tests under the implied consent statute.

The results of a chemical test done pursuant to the Vehicle Code's implied consent statute are admissible into evidence in any civil or criminal proceeding. MCL 257.625a(6)(a).^{*} If the person subject to testing under the implied consent statute chooses to undergo a test administered by someone of his or her own choosing, the results of this independent test are likewise admissible and shall be considered with other admissible evidence in determining the defendant's guilt or innocence. MCL 257.625a(6)(d).

The foregoing provisions for the admissibility of chemical test results do not limit the introduction of any other admissible evidence bearing on the following questions:

“(a) Whether the person was impaired by, or under the influence of, alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.

“(b) Whether the person had an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine or, beginning October 1, 2013, the person had an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

“(c) If the person is less than 21 years of age, whether the person had any bodily alcohol content within his or her body. As used in this subdivision, ‘any bodily alcohol content’ means either of the following:

“(i) An alcohol content of 0.02 grams or more but less than 0.08 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine or, beginning October 1, 2013, the person had an alcohol content of 0.02 grams or more but less than 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

“(ii) Any presence of alcohol within a person’s body resulting from the consumption of alcoholic liquor, other than the consumption of alcoholic liquor as a part of a generally recognized religious service or ceremony.” MCL 257.625a(7).

The amount of alcohol or the presence of a drug or both as shown by the chemical test results “is presumed to be the same as at the time the person operated the vehicle.” MCL 257.625a(6)(a).

If a chemical test described in §625a(6) is administered, the test results shall be made available to the defendant or his or her attorney upon written request to the prosecutor, with a copy of the request filed with the court. The prosecutor shall furnish the results at least two days before the date of the trial. The prosecutor shall offer the test results as evidence in the trial. Failure of the prosecutor to fully comply with the request bars the admission of the results into evidence by the prosecution. MCL 257.625a(8).

C. Blood Tests Taken for Medical Treatment After an Accident

MCL 257.625a(6)(e) provides that if a driver is transported to a medical facility after an accident and a blood sample is withdrawn for medical treatment, the results of a chemical analysis are admissible in any civil or criminal proceeding to show the amount of alcohol and/or presence of a controlled substance in the person’s blood at the time of the accident, regardless of whether the person had been offered or had refused a chemical test. The medical facility or person performing the chemical analysis shall disclose the results of the analysis to a prosecutor who requests them for use in a criminal prosecution. The Michigan Supreme Court has held that MCL

257.625a(6)(e) renders the results of blood tests admissible at trial irrespective of whether the physician-patient privilege was waived or a valid search warrant was obtained. *People v Keskimaki*, 446 Mich 240, 247 (1994).

If a driver is deceased after an accident, a blood sample shall be withdrawn in a manner directed by the medical examiner to determine the amount of alcohol and/or presence of a controlled substance. The medical examiner shall give the results of the chemical analysis to the law enforcement agency investigating the accident; that agency shall forward the results to the Department of State Police. MCL 257.625a(6)(f).

Note: The nature of an “accident” was considered by the Michigan Supreme Court in *People v Keskimaki*, *supra*. See Section 2.4(B)(1), above.

In *People v Aldrich*, 246 Mich App 101 (2001), the defendants consumed liquor and began drag-racing. One of the defendants ran a stop sign and was involved in a fatal accident. The other defendant stopped at the stop sign. The defendants were both transported to a hospital, where their blood was drawn. The defendants were convicted of involuntary manslaughter. The Court of Appeals held that the results of the defendants’ blood tests were admissible under MCL 257.625a(6)(e) even though the defendants were not under arrest at the time their blood was drawn. *Aldrich*, *supra* at 117–18, citing *People v Borchard-Ruhland*, 460 Mich 278, 285 (1999). The Court also rejected the argument of the defendant who had stopped prior to the accident that because he was not “involved in an accident,” his test results were inadmissible under §625a(6)(e). The Court relied on *People v Oliver*, 242 Mich App 92, 96–98 (2000), a case construing MCL 257.617 (failure to stop at the scene of an accident involving serious injury). See Volume 1, Section 3.15(E), for discussion of the *Oliver* case.

D. Evidentiary Effect of Defendant’s Refusal to Submit to a Chemical Test

A person’s refusal to submit to a chemical test under the implied consent provisions of the Vehicle Code is admissible in a criminal prosecution for a crime described in §625c(1) only to show that a test was offered to the defendant, but not as evidence in determining the defendant’s guilt or innocence. The jury shall be instructed accordingly. MCL 257.625a(9).

A jury instruction on the defendant’s decision to forgo chemical testing appears at CJI2d 15.9.

Note: The crimes described in §625c(1) are:

- OWI under §625(1).
- OWVI under §625(3).

- OWI or OWVI causing death or serious impairment of a body function under §625(4) or (5).
- Zero tolerance violations under §625(6).
- Child endangerment under §625(7).
- OWI (operating with the presence of drugs) under §625(8).
- Operating a commercial motor vehicle and refusing to submit to a preliminary chemical breath analysis under §625a(5).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m.
- Violation of a local ordinance substantially corresponding to §625(1), (3), (6), or (8), §625a(5) or §625m.
- Felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, if the police had reasonable grounds to believe the driver was operating the vehicle in violation of §625.

E. Foundational Requirements for Admission of Chemical Tests

For the results of chemical tests of blood alcohol to be admitted into evidence, they must meet the threshold relevancy requirements of MRE 401–403. Applying these rules in the context of an OWI case, the Court of Appeals has noted that chemical test results are admissible if: 1) they have a tendency to show that a defendant was more probably or less probably impaired or intoxicated when driving; and 2) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *People v Campbell*, 236 Mich App 490, 503 (1999).

*These cases include *People v Jacobsen*, 205 Mich App 302 (1994), rev'd on other grounds 448 Mich 639 (1995), *People v Kozar*, 54 Mich App 503 (1974), *People v Krulikowski*, 60 Mich App 28 (1975), *People v Schwab*, 173 Mich App 101 (1988), and *People v Prelesnik*, 219 Mich App 173 (1996).

*This rule prevents test takers from smoking, regurgitating, or placing anything in their mouths except for the mouthpiece.

In *People v Wager*, 460 Mich 118, 124 (1999), the Michigan Supreme Court overruled holdings in previous Court of Appeals cases that had conditioned the admissibility of chemical test results on a showing by the prosecutor that the test was performed within a reasonable time after the arrest.* In *Wager* and in *Campbell*, *supra*, both Michigan appellate courts held that the passage of time between the arrest and the test goes to the weight, not the admissibility of the test results.

The *Campbell* and *Wager* decisions did not address three other foundational requirements that had been previously articulated by the Court of Appeals as prerequisites for the admission of the results of chemical tests. These requirements are:

- The operator administering the test was qualified.
- The proper method or procedure was followed in administering the test.
- The testing device was reliable.

See, e.g., *People v Jacobsen*, 205 Mich App 302, 305 (1994), rev'd on other grounds 448 Mich 639 (1995), and *People v Kozar*, 54 Mich App 503, 509, n 2 (1974). Presumably, these three requirements continue to apply; the Supreme Court in *Wager* overruled *Kozar*, *Jacobsen* and other similar cases only “to the extent that [they] adopt a ‘reasonable time’ element.”

The propriety of test administration procedures was challenged by the defendant in *People v Wujkowski*, 230 Mich App 181 (1998). In this case the defendant was arrested for suspected drunk driving and transported to the county jail for a Breathalyzer test. In response to OWI charges, he moved to suppress the test results, asserting that the officer performing the test failed to observe him for 15 continuous minutes as required by 1994 AACCS, R 325.2655(1)(e).* Prior to administering the test, the officer had continually observed the defendant for 15 minutes, except for approximately six seconds when the officer walked away to check the amount of time elapsed. During those six seconds, another officer was with the defendant. There were no allegations that the defendant placed anything in his mouth or regurgitated. The district court denied the defendant’s motion to suppress the test results, finding that the officer’s momentary loss of view of the defendant was not significant when viewed in the totality of the circumstances. The Court of Appeals agreed with the district court, holding that the six second lapse was “so minimal that the test results cannot be assumed to be inaccurate.” 230 Mich App at 186. The panel further noted that exclusion of evidence is not necessarily the appropriate remedy for every violation of an administrative rule; suppression is an appropriate remedy only when an egregious deviation from the rule leads to questionable accuracy of the test results. 230 Mich App at 186–187.

For a case in which deviation from 1994 AACCS, R 325.2655(1)(e) required suppression of Breathalyzer test results, see *People v Boughner*, 209 Mich

App 397, 399–400 (1995), in which the Breathalyzer operator observed the defendant for less than eight minutes, and throughout the 35 minutes before the test was administered, a videotape showed that the defendant’s hand was either at his face or mouth.

In *People v Fosnaugh*, 248 Mich App 444 (2002), the police administered an evidentiary breath test after the required 15-minute observation period, and the result indicated a blood-alcohol content above the legal limit. A second test, administered immediately after the first, resulted in an “invalid sample” reading. The District and Circuit Courts ruled the first result inadmissible because the second test did not confirm the results of the first test, because the first result was tainted by the presence of mouth alcohol, and because the officer administering the test failed to administer a third test. *Id.* at 447–48. The Court of Appeals reversed, concluding that 1994 AACPS, R 325.2655(1)(f) did not require suppression of the first test result in the circumstances of this case. *Fosnaugh, supra* at 450. Rule 325.2655(1)(f) requires a second test “unless . . . a substance is found in the person’s mouth subsequent to the first test that could interfere with the test result.” The rule also states that “[o]btaining the first sample is sufficient to meet the requirements for evidentiary purposes prescribed in [MCL 257.625c].” The second test resulted in an “invalid sample” reading due to the presence of mouth alcohol, a substance that interfered with the test result. Thus, a second sample was not required. *Fosnaugh, supra* at 452. Defendant offered no evidence or explanation as to why the testing machine did not invalidate the first result, and the lack of a confirming test was relevant only to the weight of the first result, not its admissibility. *Id.*, citing *Wager, supra* and *Campbell, supra*. Further, the Court of Appeals concluded that the officer did not violate the Michigan Breath Test Operator Training Manual by failing to administer a third test because that publication only stated that another test “should” be administered following an “invalid sample” result, and Rule 325.2655(1)(f) provides that a first sample “is sufficient . . . for evidentiary purposes.” *Fosnaugh, supra* at 454–56.

2.9 General Sentencing Considerations for §625 and §904 Offenses

This section addresses general principles and statutory provisions that apply whenever the court imposes criminal penalties for offenses arising under Vehicle Code §625 and §904. The criminal penalties for specific offenses are listed in the discussion of each offense that appears in Chapters 3 and 4 of this volume. A general discussion of licensing and vehicle sanctions is found above in Sections 2.10 and 2.11, respectively.

A. Conflict Between the Code of Criminal Procedure and the Vehicle Code

A conflict between the penal provisions of the Vehicle Code and the Code of Criminal Procedure must be resolved in favor of the more specific Vehicle Code provisions. In *Wayne County Pros v Wayne Circuit Judge*, 154 Mich App 216 (1986), the trial court sentenced a defendant convicted of OWI-3d to a three year probationary term with 20 weekends to be served in jail. This sentence was authorized by the Code of Criminal Procedure, MCL 771.1(1), which authorized probationary sentences for felony and misdemeanor convictions other than for first degree murder, treason, first and second degree criminal sexual conduct, armed robbery, and major controlled substance offenses. The prosecutor filed a motion for superintending control, asserting that the defendant should have been sentenced under the general penal provision of the Vehicle Code that mandated a sentence of one to five years in prison and/or a fine of not less than \$500.00 nor more than \$5,000.00. (MCL 257.902) The Court of Appeals vacated the sentence, holding as follows:

“Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act The dates on which the two statutes were enacted or reenacted are irrelevant; a later statute which is general and affirmative in its provisions will not abrogate a former one which is particular or special Hence, even though §902 of the vehicle code has not been amended since 1949, whereas the probation statute was reenacted as recently as 1982 PA 470, nonetheless, the former controls.” 154 Mich App at 221.

Applying the foregoing principles to the case at bar, the Court of Appeals found that the trial court should have imposed a prison term and/or fine on the defendant as provided in the Vehicle Code. However, the trial court’s probationary order was not invalid; in the court’s discretion, it could supplement the probationary order with a fine of not less than \$500.00 nor more than \$5,000.00 to comply with the Vehicle Code’s general penal provision. 154 Mich App at 221–222.

B. Establishing Prior Convictions

In repeat drunk driving and DWLS cases, a prior conviction* shall be established at or before sentencing by one or more of the following:

- An abstract of conviction.
- A copy of the defendant’s driving record.

*See Section 1.3(G) of this volume for a definition of “prior conviction.”

- An admission by the defendant.

See MCL 257.625(17) and MCL 257.904(9).

A jury has no role in determining whether the defendant has been convicted of prior drunk driving offenses. *People v Weatherholt*, 214 Mich App 507, 512 (1995).

In *People v Callon*, 256 Mich App 312, 315 (2003), the Michigan Court of Appeals upheld the use of a “prior conviction” to enhance a conviction of OWI to a felony. The defendant was convicted of OUIL as a third offender. The defendant claimed that use of his “prior conviction” operated as an ex post facto law because the prior OWVI occurred before the effective date of the amendment adding OWVI to the list of offenses in the enhancement statute. The Court held that the enhancement statute did not act as an ex post facto law because it did not attach legal consequences to defendant’s prior OWVI conviction but rather attached legal consequences to the defendant’s future conduct of committing an OWI. *Id.* at 318.

In *People v Haynes*, 256 Mich App 341, 342 (2003), the Court of Appeals upheld the use of a prior uncounselled juvenile adjudication for a “zero tolerance” violation for the purposes of enhancement. The Court held that “a trial court may consider prior juvenile delinquency adjudications obtained without the benefit of counsel in determining a defendant’s sentence where the prior adjudication did not result in imprisonment.” *Id.* at 348-49. The Court reaffirmed existing case law permitting use of prior uncounselled misdemeanor convictions for enhancement where counsel was not required for the prior offenses or where the prior adjudications did not result in imprisonment. *Reichenbach, supra*; *People v Daoust*, 228 Mich App 1, 17-19 (1998).

C. Alcohol Assessment and Counseling in Drunk Driving Cases

MCL 257.625b(5) contains alcohol assessment provisions for offenders who violate the following Vehicle Code provisions:

- OWI under §625(1) or a substantially corresponding local ordinance.
- OWVI under §625(3) or a substantially corresponding local ordinance.
- OWI or OWVI causing death under §625(4).
- OWI or OWVI causing serious impairment of a body function under §625(5).
- Zero tolerance violations under §625(6) or a substantially corresponding local ordinance.

*Effective May
3, 2004. 2004
PA 62.

- Child endangerment under §625(7).
- OWI (operating with the presence of drugs) under §625(8) or a substantially corresponding local ordinance.*

Before imposing sentence for one of the foregoing offenses, the court shall order both first-time and repeat offenders to undergo screening and assessment by a person or agency designated by the Office of Substance Abuse Services to determine whether they are likely to benefit from rehabilitative services, including alcohol or drug education and alcohol or drug treatment programs. The court may order a first-time offender to participate in and successfully complete one or more appropriate rehabilitative programs as part of the sentence. If an offender has one or more prior convictions, the court *shall* order participation in and successful completion of such a program or programs. All offenders shall pay the costs of the screening, assessment, and rehabilitative services.

D. Ordering Costs in Drunk Driving Cases

The court may order any defendant convicted of a Vehicle Code §625 violation to pay the costs of prosecution. MCL 257.625(13).

Orders to reimburse the expenses of prosecution are also authorized under MCL 769.1f, for offenders who violate the following provisions:

- OWI under §625(1) or a substantially corresponding local ordinance.
- OWVI under §625(3) or a substantially corresponding local ordinance.
- OWI or OWVI causing death under §625(4).
- OWI or OWVI causing serious impairment of a body function under §625(5).
- Zero tolerance violations under §625(6) or a substantially corresponding local ordinance.
- Child endangerment under §625(7).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m or a substantially corresponding local ordinance.

For the above violations, MCL 769.1f further permits the court to order reimbursement to the state or a local unit of government for expenses incurred in relation to the violation. These expenses include wages of law enforcement personnel, wages of fire department and emergency medical service personnel, and costs of medical supplies used in providing services.

If the court places the defendant on probation or parole, it shall make reimbursement of expenses related to the violation a condition of probation or parole. Failure to make a good faith effort to comply with the court's order for reimbursement shall be grounds for revocation of probation or parole. MCL 769.1f(5).

E. Community Service in Drunk Driving Cases

Persons sentenced to perform community service for a violation of Vehicle Code §625 may not receive compensation and must reimburse the state or appropriate local unit of government for the cost of supervision incurred by the state or local unit of government as a result of the person's activities in that service. MCL 257.625(14).

F. Applying the Sentencing Guidelines

Legislative sentencing guidelines were enacted by 1998 PA 317, codified at Chapter XVII of the Code of Criminal Procedure, MCL 777.1 et seq. These guidelines apply to offenses committed on or after January 1, 1999. They apply to every felony and to every misdemeanor punishable by more than one year of imprisonment, if there is judicial sentencing discretion and if the offense was enacted prior to the enactment of the guidelines.

1. Guidelines Provisions as of September 30, 2003

Under MCL 777.12f and 777.12h, the following offenses are subject to the legislative sentencing guidelines:

- §625(4)(a) and (b)—violation of §625(1), (3) or (8) causing death.
- §625(5)—violation of §625(1), (3), or (8) causing serious impairment of body function.
- §625(7)(a)(ii)—subsequent violations of the child endangerment provision under §625(7).
- §625(9)(c)—violation of §625(1) or (8) within ten years of two prior convictions.
- §625(10)(b) and (c)—violation of §625(2) where death or serious impairment of a body function resulted from operator's conduct.
- §625(11)(c)—violation of §625(3) within ten years of two prior convictions.
- §625k(7) and (9)—violation of provisions governing certification of ignition interlock providers.
- §625m(5)—commercial motor vehicle violation within ten years of two prior convictions.

- §904(4)—violation of §904(1) causing death.
- §904(5)—violation of §904(1) causing serious impairment of body function or death.
- §904(7)—violation of §904(2) causing serious impairment of body function or death.

Pursuant to MCL 777.12f and 777.12h, Vehicle Code §625 and §904 offenses belong to the following Crime Groups and Crime Classes:

- §625(4)(a)—Person, Class C.
- §625(4)(b)—Person, Class B.
- §625(5)—Person, Class E.
- §625(7)(a)(ii)—Person, Class E.
- §625(9)(c)—Public safety, Class E.
- §625(10)(b)—Person, Class E.
- §625(10)(c)—Person, Class G.
- §625(11)(c)—Public safety, Class E.
- §625k(7) and (9)—Public safety, Class D.
- §625m(5)—Public safety, Class E.
- §904(4)—Person, Class C.
- §904(5)—Person, Class E.
- §904(7)—Person, Classes E and G.

Offense variables 3 and 18 are of particular interest in drunk driving cases. Effective September 30, 2003, Public Act 134 changed the point values assessed in scoring offense variable (OV) 3, the variable used to address the severity of physical injury suffered by victims of the crime being scored. MCL 777.33. Prior to 2003 PA 134, 35 points were assessed against a defendant when the offense was OWI or OWVI and “[a] victim was killed.” PA 134 increased the number of points assessed from 35 to 50 where death results from the commission of the offense and the offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive and any of the following apply:

“(i) The offender was under the influence of or visibly impaired by the use of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.

“(ii) The offender had an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine or, beginning October 1, 2013, the offender had an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

“(iii) The offender’s body contained any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or a controlled substance described in section 7214(a)(iv) of the public health code, 1978 PA 368, MCL 333.7214.” MCL 777.33(2)(c)(i)–(iii).

Note, however, that for the offense of MCL 257.904(4) (DWLS causing death), OV 3 must be scored at zero points. *People v Brown*, 265 Mich App 60, 66 (2005). In *Brown, supra*, the Court concluded that “the proper score for OV 3 in cases where a victim is killed, but the sentencing offense is homicide not falling under MCL 777.33(2)(c), is zero points.”

OV 18 assesses points for the impact of alcohol or drugs on the offender’s ability to operate a motor vehicle. MCL 777.48. The number of points increases with the level of the offender’s bodily alcohol or drug content or the extent to which he or she was visibly impaired by the consumption of alcohol or drugs.

The sentencing guidelines also identify seven prior record variables that are assigned points according to circumstances described in MCL 777.50-777.57. For purposes of scoring, prior felonies are assigned a class designation depending on the seriousness of the offense. When scoring prior record variables (PRV) under the legislative sentencing guidelines, the following provision in PRV 5 is of particular importance to convictions involving OWI and OWVI:

“In scoring prior record variable 5 (prior misdemeanor convictions or juvenile adjudications), the court should count all prior misdemeanor convictions and prior misdemeanor juvenile adjudications for operating a vehicle, vessel, aircraft, or locomotive while under the influence of or impaired by alcohol, a controlled substance, or a combination of alcohol and a controlled substance. However, prior misdemeanor convictions that are used to enhance the current offense to felony status cannot be scored. For example, in a felony OWI case (involving a third offense within ten years), the two prior convictions used to enhance the offense to felony status are not scored, but any other additional prior misdemeanor OWI conviction will be.” MCL 777.55(2)(b).

2. Sentence Departures

MCL 769.34(2)(a) contains a provision expressly applicable to sentencing situations involving violations of the Motor Vehicle Code (MVC). In relevant part, MCL 769.34(2)(a) states:

“If the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the Michigan vehicle code [] authorizes the sentencing judge to impose a sentence that is less than that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section.”

In *People v Hendrix*, 263 Mich App 18, 19 (2004), the defendant was convicted of OWI-3d and DWLS (second offense). The prosecutor requested that the defendant be sentenced to prison—to the jurisdiction of the department of corrections—for one to five years as authorized by MCL 257.625(8)(c)(i). *Hendrix, supra*, 263 Mich App at 19. The statutory sentence guidelines as calculated for the defendant resulted in a recommended minimum range of 0 to 11 months. *Hendrix, supra*, 263 Mich App at 19. The trial court sentenced the defendant to one year probation to be served in the county jail. *Hendrix, supra*, 263 Mich App at 19.

The Michigan Court of Appeals first denied the prosecutor’s application for leave to appeal but the Michigan Supreme Court remanded the case to the Court of Appeals as if on leave granted. The Supreme Court specifically instructed the Court of Appeals “to address whether MCL 257.625(8)(c) ‘mandates a minimum sentence for an individual sentenced to the department of corrections’ within the meaning of MCL 769.34(2)(a), as well as the applicability of MCL 769.34(4)(a) under these circumstances.” Court of Appeals order dated July 8, 2004, in which the Court vacated its previous opinion and issued a new opinion in *People v Hendrix*.

In its new opinion, the Court of Appeals concluded that the sentencing alternatives provided in MCL 257.625(8)(c)(i) and (ii) for OWI-3d offenders reflected the sentencing scheme referenced by MCL 769.34(2)(a). 263 Mich App at 21. Under MCL 257.625(8)(c), a trial court is mandated to impose a fine and one of two sentence alternatives provided by the statute. In addition to the mandatory fine imposed (from \$500.00 to \$5,000.00 at the court’s discretion), the court is required to sentence the defendant to the jurisdiction of the Department of Corrections (for a minimum of one year and a maximum of five years) or to sentence the defendant to probation with imprisonment in the county jail (for a minimum of 30 days and a maximum of one year) and community service (for a minimum of 60 days and a maximum of 180 days). MCL 257.625(8)(c).

The *Hendrix* Court explained that the sentencing court has discretion to choose between the two alternatives presented in the MVC, each of which had a mandatory minimum term associated with that alternative. *Hendrix, supra*, 263 Mich App at 21-22. The Court further explained that the MVC alternatives were clearly addressed by the statutory language in MCL 769.34(2)(a), which authorized the trial court to impose a sentence less than the minimum sentence mandated by the MVC if the MVC mandated a minimum sentence for a defendant sentenced to the jurisdiction of the Department of Corrections. *Hendrix, supra*, 263 Mich App at 21. According to the plain language of MCL 769.34(2)(a), a sentence that exceeded the range recommended by the guidelines is not a departure if the sentence is less than the minimum sentence mandated for a defendant sentenced to the jurisdiction of the Department of Corrections. *Hendrix, supra*, 263 Mich App at 22.

In *Hendrix*, the trial court properly sentenced the defendant according to the alternative available under MCL 257.625(8)(c)(ii)—to one year of probation to be served in the county jail—a sentence that exceeded the defendant’s guidelines range of 0 to 11 months, but which fell below the mandatory minimum term of one year if the defendant had been sentenced to the jurisdiction of the Department of Corrections. The *Hendrix* Court further concluded that MCL 769.34(4)(a), which requires a “substantial and compelling” reason to depart from a minimum sentence range, did not apply to the defendant’s sentence. *Hendrix, supra*, 263 Mich App at 20 n 1. Without elaboration, the Court held that MCL 769.34(4)(a) did not apply because the defendant’s sentence was governed by the language in MCL 769.34(2)(a), which specifically addressed sentences under the MVC. *Id.*

G. Sentence Credit

Offenders are not entitled to sentence credit under MCL 769.11b for:

- Time spent as a resident in a private rehabilitation program as a condition of probation. *People v Whiteside*, 437 Mich 188 (1991).
- Time spent on a tether program, if participation in the program is not due to the offender’s being denied or unable to furnish bond. *People v Reynolds*, 195 Mich App 182, 183 (1992).

In *Reynolds*, the Court of Appeals noted that the Double Jeopardy Clauses of the Michigan and federal constitutions only require sentence credit for confinements amounting to time spent “in jail.” The Court of Appeals characterized the tether program at issue in the case as a “restriction, not a confinement.” 195 Mich App at 184.

H. Minimum State Costs

If a court orders a defendant to pay any combination of fines, costs, or assessments, the court shall order the defendant to pay state minimum costs according to the following schedule:

- not less than \$60.00 for felony convictions.
- not less than \$45.00 for “serious” or “specified misdemeanor” convictions.
- not less than \$40.00 for misdemeanors (other than serious or specified) and ordinance violations.

MCL 769.1j(1); MCL 600.8381(4).

*See Chapter 3 of this volume for discussion of drunk driving offenses.

“Serious misdemeanors” are listed in MCL 780.811(1)(a). The only “serious misdemeanor” discussed in Volume 3 is operating a motor vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful bodily alcohol content, MCL 257.625(1) and (3), if the violation involves an accident resulting in damage to another individual’s property or physical injury or death to another individual.*

The definition of “serious misdemeanor” includes a violation of a local ordinance substantially corresponding to the violation noted above, and a charged felony or “serious misdemeanor” subsequently reduced or pled to as a misdemeanor.

“Specified misdemeanors” are misdemeanor violations of statutory provisions listed in MCL 780.901(h). The “specified misdemeanors” discussed in Volume 3 are:

*See Section 7.4 of this volume.

*See Chapter 3 of this volume.

*See Section 4.1 of this volume.

- fleeing and eluding a police or conservation officer, MCL 257.602a,*
- operating a motor vehicle while intoxicated or visibly impaired by alcohol or drugs or with an unlawful bodily alcohol content, MCL 257.625(1) and (3), where the violation does not cause property damage or another person’s injury or death,* and
- driving while license is suspended or revoked, MCL 257.904.*

The definition of “specified misdemeanor” includes a violation of a local ordinance substantially corresponding to the violations listed above.

In addition, the minimum state cost must be a condition of probation. MCL 771.3(1)(g) and MCL 769.1j(3).

2.10 Licensing Sanctions

This section generally addresses driver’s license suspensions and revocations that may be imposed by the Secretary of State in cases involving a violation of §625 or §904 of the Vehicle Code. It also contains information about restricted licenses, license reinstatement after revocation, and appeals to the circuit court from a licensing sanction imposed by the Secretary of State.

Note: Prior to October 1, 1999, both courts and the Secretary of State had statutory authority to order licensing sanctions for certain offenses, including OWI or OWVI causing death or serious injury. For arrests after October 1, 1999, the authority to impose licensing sanctions has been consolidated in the Secretary of State in *all* cases, *except* for:

- Drug suspensions ordered under MCL 333.7408a.
- No proof of insurance convictions under MCL 257.328.

A. Sanctions for Persons Who Commit an Offense While Driving with a Suspended or Revoked License

1. Driving with a Suspended or Revoked License and Causing Death or Serious Impairment of a Body Function

The Secretary of State must revoke a driver's license upon receiving records of conviction of driving while license suspended/revoked causing death or serious impairment of a body function under Vehicle Code §904(4) or (5). MCL 257.303(5)(d).

Under MCL 257.303(5)(b), a violation of §904(4) or (5) can also cause the Secretary of State to revoke a driver's license if this offense occurs within seven years of one or more prior convictions of the following offenses:

“(i) A felony in which a motor vehicle was used.

“(ii) A violation or attempted violation of section 601b(2) or (3), section 601c(1) or (2), section 602a(4) or (5), section 617, section 653a(3) or (4), or section 904(4) or (5).

“(iii) Negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.

“(iv) A violation or attempted violation of [MCL 750.479a(4) or (5)].”

“Multiple convictions or civil infraction determinations resulting from the same incident shall be treated as a single violation for purposes of” license denial or revocation. MCL 257.303(8).

MCL 257.303(7) states as follows:

“(7) The secretary of state shall not issue a license under this act to a person whose license has been revoked under this act or revoked and denied under subsection (5) until all of the following occur, as applicable:

“(a) The later of the following:

(i) The expiration of not less than 1 year after the license was revoked or denied.

(ii) The expiration of not less than 5 years after the date of a subsequent revocation or denial occurring within 7 years after the date of any prior revocation or denial.

“(b) For a denial under subsection (5)(a), (b), (c), and (g), the person rebuts by clear and convincing evidence the presumption resulting from the prima facie evidence that he or she is a habitual offender. The convictions that resulted in the revocation and denial constitute prima facie evidence that he or she is a habitual offender.

“(c) The person meets the requirements of the department.”

2. Other Offenses Committed While Driving with a Suspended or Revoked License

Licensing sanctions for other offenses committed while driving with a suspended or revoked license are found in MCL 257.904(10)–(12). Under these provisions, the Secretary of State must impose additional licensing sanctions upon persons convicted of or found responsible for the unlawful operation of a vehicle or a moving violation reportable under Vehicle Code §732 while driving with a suspended or revoked license.* The periods of sanction are as follows:

- If the violation occurred during a suspension of definite length, or if the violation occurred before the person was approved for a license following revocation, the Secretary of State must impose an additional like period of suspension or revocation. MCL 257.904(10).
- If the violation occurred while the person’s license was indefinitely suspended, or if the person’s application for a license was denied, the Secretary of State must impose a 30-day period of suspension or denial. MCL 257.904(11).
- Upon receiving a record of the conviction, bond forfeiture, or a civil infraction determination of a person for unlawful operation of a commercial motor vehicle while the vehicle group designation is suspended under Vehicle Code §319a or §319b* or revoked, the Secretary of State shall immediately impose an additional like period of suspension or revocation. This provision applies only if the violation occurs: 1) during a suspension of definite length; 2) before the person is approved for a license following a revocation; or 3) when the person is operating a commercial vehicle while

*Vehicle Code §732 contains abstract requirements. Violations reportable under §732 are listed in Section 2.12(C), below.

*MCL 257.319a – 257.319b contain general provisions governing suspensions or revocations of commercial vehicle licenses.

disqualified under the Commercial Motor Vehicle Safety Act of 1986, 49 USC 31301 et seq. (containing federal criminal penalties for operating a commercial carrier under the influence of drugs or alcohol). MCL 257.904(12).

The licensing sanctions in Vehicle Code §904(10)–(12) do not to apply to persons who operate a vehicle solely for the purpose of protecting human life or property if the life or property is endangered and summoning prompt aid is essential. MCL 257.904(15).

B. Revocation of Driver's License for Drunk Driving Offenses

The Secretary of State shall revoke a person's driver's license upon receipt of appropriate records of conviction of certain drunk driving offenses or combinations of drunk driving offenses listed in MCL 257.303(5)(c), (d), (e), and (g). MCL 257.303(5) states in part:

“(c) Any combination of 2 convictions within 7 years for any of the following or a combination of 1 conviction for a violation or attempted violation of section 625(6)* and 1 conviction for any of the following within 7 years:

“(i) A violation or attempted violation of section 625, except a violation of section 625(2), or a violation of any prior enactment of section 625 in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.

“(ii) A violation or attempted violation of section 625m.

“(iii) Former section 625b.

“(d) One conviction for a violation or attempted violation of...section 625(4) or (5)... or section 904(4) or (5).

“(e) One conviction of negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.

“(g) Any combination of 3 convictions within 10 years for any of the following or 1 conviction for a violation or attempted violation of section 625(6) and any combination of 2 convictions for any of

*Vehicle Code §625(6) is the “zero tolerance” provision.

the following within 10 years, if any of the convictions resulted from an arrest on or after January 1, 1992:

“(i) A violation or attempted violation of section 625, except a violation of section 625(2), or a violation of any prior enactment of section 625 in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.

“(ii) A violation or attempted violation of section 625m.

“(iii) Former section 625b.

“Multiple convictions or civil infraction determinations resulting from the same incident shall be treated as a single violation for purposes of” license denial or revocation. MCL 257.303(8).

MCL 257.303(7) states:

“(7) The secretary of state shall not issue a license under this act to a person whose license has been revoked under this act or revoked and denied under subsection (5) until all of the following occur, as applicable:

“(a) The later of the following:

(i) The expiration of not less than 1 year after the license was revoked or denied.

(ii) The expiration of not less than 5 years after the date of a subsequent revocation or denial occurring within 7 years after the date of any prior revocation or denial.

“(b) For a denial under subsection (5)(a), (b), (c), and (g), the person rebuts by clear and convincing evidence the presumption resulting from the prima facie evidence that he or she is a habitual offender. The convictions that resulted in the revocation and denial constitute prima facie evidence that he or she is a habitual offender.

“(c) The person meets the requirements of the department.”

C. Reinstatement of License After Revocation Expires — Issuance of Restricted License After Drunk Driving Conviction

If a person's license has been denied or revoked upon conviction of a drunk driving offense as provided in MCL 257.303(5)(c), (d), or (g),* that person may apply for a license or reinstatement of a license after expiration of the one or five year period set forth in MCL 257.303(7). To obtain restricted driving privileges, the petitioner must rebut the presumption resulting from the prima facie evidence of his or her convictions by clear and convincing evidence, and "meet the requirements of the department." MCL 257.303(7)(b)-(c). Administrative rules R 257.301-257.314 define the "requirements of the department" in more detail. If the hearing officer issues a restricted license following a hearing held after October 1, 1999, the officer shall impose both of the following requirements contained in MCL 257.322(6):

"(a) Require installation of a functioning ignition interlock device . . . on each motor vehicle the person owns or intends to operate, the costs of which shall be borne by the person whose license is restricted.*

"(b) Condition issuance of a restricted license upon verification by the secretary of state that an ignition interlock device has been installed."

Restricted licenses requiring an ignition interlock device shall be issued for a one-year period. After that time, the hearing officer may continue the ignition interlock requirement for any length of time. MCL 257.322(9).

Employer-owned vehicles that will be operated by an employee whose restricted license contains an ignition interlock requirement need not be equipped with such a device. However, the Secretary of State must notify the employer of the employee's license restriction. This employer-owned vehicle exception does not apply to vehicles operated by a self-employed person who uses the vehicle for both business and personal use. MCL 257.322(8).

The hearing officer must not issue a restricted license under the foregoing provisions that would permit the person to operate a commercial motor vehicle that hauls hazardous materials. MCL 257.322(7).

For discussion of penalties imposed for ignition interlock device violations, see Section 5.1 of this volume.

*These provisions are cited at Section 2.10(B), above.

*See Section 1.3(D) of this volume for a definition of "ignition interlock device."

*On suspensions imposed for refusal to submit to a chemical test under the Vehicle Code's "implied consent" provisions, see Section 2.3(C), above.

*See Section 1.3(G) of this volume for a definition of "prior conviction."

*If the defendant has one or more prior convictions other than a violation of §625(6) within seven years, the defendant's license must be revoked. MCL 257.303(5)(c).

D. Suspension of Driver's License for §625 Offenses*

1. Periods of Suspension

Suspension of a driver's license for a drunk driving violation under Vehicle Code §625 or §625m (operating a commercial vehicle with an unlawful bodily alcohol content) is governed by MCL 257.319(8). The applicable periods of suspension are as follows:

- 180 days for a violation of §625(1) or (8) (OWI) if the defendant has no prior convictions within seven years. After the first 30 days, a restricted license may be issued for all or a portion of the remaining period of suspension.
- 90 days for a violation of §625(3) (OWVI) if the defendant was impaired due to the consumption of intoxicating liquor only and has no prior convictions within seven years.* A restricted license may be issued for all or a portion of the suspension.
- 180 days for a violation of §625(3) (OWVI) if the defendant was impaired due to the consumption a controlled substance or a combination of a controlled substance and intoxicating liquor and has no prior convictions within seven years. A restricted license may be issued for all or a portion of the suspension.
- 30 days for a violation of §625(6) (zero tolerance) if the defendant has no prior convictions within seven years. A restricted license may be issued for all or a portion of the suspension.
- 90 days for a violation of §625(6) (zero tolerance) if the defendant has one or more prior convictions of violating §625(6) within seven years. In this instance, the statute makes no provision for issuance of a restricted license during the period of the suspension.*
- 180 days for violation of §625(7) (child endangerment) if the defendant had no prior convictions within seven years. After expiration of the first 90 days of suspension, a restricted license may be issued.
- 90 days for a violation of §625m (operating a commercial vehicle with an unlawful bodily alcohol content) if the defendant has no prior convictions within seven years. A restricted license may be issued for all or a portion of the suspension.

2. Restricted Licenses

A restricted license issued under MCL 257.319 shall permit the defendant to drive under one or more of the circumstances listed in subsection (17) of the statute. These circumstances are:

“(a) In the course of the person’s employment or occupation.

“(b) To and from any combination of the following:

“(i) The person’s residence.

“(ii) The person’s work location.

“(iii) An alcohol or drug education or treatment program as ordered by the court.

“(iv) The court probation department.

“(v) A court-ordered community service program.

“(vi) An educational institution at which the person is enrolled as a student.

“(vii) A place of regularly occurring medical treatment for a serious condition for the person or a member of the person’s household or immediate family.”

While driving, a person subject to a restricted license shall carry proof of his or her destination, and the hours of any employment, class, or other reason for traveling. The person must display this proof upon the request of a police officer. MCL 257.319(18).

The Court of Appeals has narrowly construed the word “occupation” in a similar restricted license provision that preceded the current statute. In *People v Seeburger*, 225 Mich App 385, 394 (1997), it held that “occupation” does not include child rearing as the second career of a working single parent, and refused to allow modification of a restricted license to permit a working mother to drive her children to and from school and day care.

E. Appeals From Licensing Sanctions

Persons aggrieved by a final determination of the Secretary of State denying, revoking, suspending, or restricting a driver’s license may file an appeal with the Secretary of State pursuant to MCL 257.322. This statute empowers the Secretary of State to appoint hearing officers to hear such appeals and sets forth procedural requirements for hearings.

The hearing officer’s decision may be appealed to the circuit court. MCL 257.323 governs appeals to circuit court from a final determination by the Secretary of State denying, revoking, suspending, or restricting a driver’s license.

*For appeals in cases where license sanctions were imposed for refusal to submit to a chemical test under the implied consent statute, see Section 2.3(C)(4), above.

1. Appeal Procedures in Circuit Court

Under MCL 257.323(1), appeals are taken to the circuit court in the county where the aggrieved person resides, except in the following cases:

- If the appeal arises from a refusal to submit to a chemical test under the implied consent statute, Vehicle Code §625f, it is taken in the county where the person was arrested.*
- If the appeal involves a failure to produce evidence of insurance under Vehicle Code §328, it is taken pursuant to the trial court's order.

The aggrieved person must file the petition for review within 63 days after the Secretary of State's determination is made; however, for good cause shown, this period may be extended to 182 days after the determination. MCL 257.323(1).

Once the petition for review is filed, the circuit court must enter an order setting the case for hearing on a day certain not more than 63 days after the date of the order. The order, the petition for review, and all supporting affidavits must be served on the Secretary of State's office in Lansing. The petition must include the driver's full name, address, birth date, and driver's license number. Service must be made not less than 20 days before the hearing date, unless the aggrieved person is seeking a review of the record made at the administrative hearing. In the latter case, service must be made not less than 50 days before the hearing date. MCL 257.323(2).

2. Standard of Review

For certain license denials, suspensions, or restrictions, the court may take testimony and examine all the facts and circumstances relating to the sanction. The sanctions for which this level of review is permitted are as follows:

- DWLS suspensions imposed under Vehicle Code §904(10) or (11).
- A first violation under the implied consent statute, Vehicle Code §625f.
- A refusal to issue a license to a person afflicted with a physical or mental disability or disease preventing that person from exercising reasonable and ordinary control over a vehicle under Vehicle Code §303(1)(d).
- A suspension or restriction of a license based on a physical or mental disability or infirmity, or upon an unsafe driving record under Vehicle Code §320.
- A licensing action under Vehicle Code §310d, governing probationary licenses.

In the foregoing cases, the court may affirm, modify, or set aside the restriction, suspension, or denial; however, it may not order the Secretary of State to issue a restricted or unrestricted license that would permit a person to drive a commercial motor vehicle hauling a hazardous material. The petitioner shall file a certified copy of the court's order with the Secretary of State's office in Lansing within seven days after entry of the order. MCL 257.323(3).

For denials, suspensions, restrictions, or revocations imposed for Vehicle Code violations other than those listed above, the scope of judicial review is more limited. Under MCL 257.323(4), the court shall confine its consideration to a review of the administrative hearing or driving records for a statutory legal issue, and shall not grant restricted driving privileges. The court shall set aside the hearing officer's determination only if the petitioner's substantial rights have been prejudiced because the determination is any of the following:

- In violation of the U.S. Constitution, the Michigan Constitution, or a statute.
- In excess of the Secretary of State's statutory authority or jurisdiction.
- Made upon unlawful procedure resulting in material prejudice to the petitioner.
- Not supported by competent, material, and substantial evidence on the whole record.
- Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion.
- Affected by other substantial and material error of law.

Note: For license denials or revocations imposed under MCL 257.303, the following provision regarding judicial review applies:

“Judicial review of an administrative licensing sanction under section 303 shall be governed by the law in effect at the time the offense was committed or attempted. If 1 or more of the convictions involved in an administrative licensing sanction is a violation or attempted violation of this act committed or attempted after January 1, 1992, judicial review of that sanction shall be governed by the law in effect after January 1, 1992.” MCL 257.320e(6).

F. Stay of Licensing Sanction Pending Appeal from Misdemeanor Drunk Driving Conviction

In misdemeanor drunk driving cases, MCL 257.625b(6) provides for a stay of licensing sanctions pending appeal as follows:

“If the judgment and sentence are appealed to circuit court, the court may ex parte order the secretary of state to stay the suspension, revocation, or restricted license issued by the secretary of state pending the outcome of the appeal.”

This provision does not specify the drunk driving offenses to which it applies. As it refers to appeals to circuit court, it apparently applies to the misdemeanor violations mentioned in Vehicle Code §625b, which are:

- OWI in violation of §625(1) or a substantially corresponding local ordinance.
- OWVI in violation of §625(3) or a substantially corresponding local ordinance.
- Zero tolerance violations under §625(6) or a substantially corresponding local ordinance.
- Child endangerment under §625(7).
- OWI under §625(8).
- Operating a commercial motor vehicle with an unlawful bodily alcohol content under §625m or a substantially corresponding local ordinance.

2.11 Vehicle Sanctions

The 1998 amendments to the Vehicle Code authorize (or, in some cases, require) courts to impose vehicle sanctions as part of the sentence for certain drunk driving or DWLS offenses. These sanctions consist of vehicle immobilization under MCL 257.904d and vehicle forfeiture under MCL 257.625n. Additionally, the Secretary of State may deny registration to certain offenders under MCL 257.219(1)(d), (2)(d). This section generally addresses procedures that apply when imposing the foregoing vehicle sanctions. Information about the mandatory imposition or duration of these sanctions in the context of specific offenses is found in the discussion of these offenses that follows in Chapters 3 and 4 of this volume. Penalties for violations of vehicle sanctions are found in Chapter 5 of this volume.

Note: In addition to the vehicle sanctions discussed in this section, the Vehicle Code also authorizes registration plate confiscation and driver’s license restrictions requiring installation of an

ignition interlock device. Registration plate confiscation is discussed at Section 2.5, above. Restricted licenses requiring installation of an ignition interlock device are addressed at Section 2.10(C), above.

A. Vehicle Immobilization

Vehicle immobilization under MCL 257.904d limits access to vehicles by offenders who violate laws prohibiting “drunk driving” and driving with a suspended or revoked license. Vehicle immobilization is part of a statutory scheme that increases penalties depending upon the number and frequency of the offender’s violations of these laws. MCL 257.904d(8)(b) defines “immobilization” of a vehicle to mean “requiring the motor vehicle involved in the violation immobilized in a manner provided in section 904e.”

1. Methods of Immobilization

No single method of immobilizing a vehicle is prescribed by statute. MCL 257.904e(1) authorizes courts to order vehicle immobilization “by the use of any available technology approved by the court that locks the ignition, wheels, or steering of the vehicle or otherwise prevents any person from operating the vehicle or that prevents the defendant from operating the vehicle.” The statute further gives the court discretion to order storage of an immobilized vehicle in a place and manner it deems appropriate. MCL 257.904e(6) states that “to the extent that a local ordinance regarding the storage or removal of vehicles conflicts with an order of immobilization issued by the court, the local ordinance is preempted.”

Immobilization techniques include the following:

- ignition lock;
- steering column lock or “club”;
- wheel “boot”;
- gas cap lock;
- impoundment;
- tethering the defendant; and
- immobilization sticker.

Courts may use a single method to immobilize vehicles, they may use several methods in conjunction with one another (e.g., gas cap lock and immobilization sticker), or they may provide defendants with a list of options. Frequently used methods are the steering column lock or “club,” tethering the defendant, and vehicle impoundment.

Steering column lock or “club.” A steering column lock or “club” should be installed by a law enforcement officer or probation officer. When the device is installed, the officer should record the mileage; at the end of the immobilization period, the mileage should be checked to determine if the device has been circumvented. Random inspections should be conducted in conjunction with these methods to ensure compliance with the immobilization order.

Tethering the offender. Tethering the offender prevents the offender from operating a vehicle while allowing family members or others access to that vehicle. Charney, *Repeat offender driving reform: summary of key elements and practice tips*, 79 Mich B J 810, 813 (2000). SCAO Form 267 contains a check-box for ordering the offender and vehicle to be immobilized using a tether.

Vehicle impoundment. The vehicle used in the offense will be impounded at the time of arrest if there is no licensed and sober driver to move the vehicle. If this occurs, the offender may be given a choice of continuing the impoundment as the method of immobilizing the vehicle or paying the requisite fees to have the vehicle towed to his or her residence. If the offender chooses the latter course, another immobilization method must then be used.

Ordering the defendant to pay the costs of immobilization. The defendant may be ordered to pay the costs of immobilization and storage. MCL 257.904e(1). MCR 1.110 states that “[f]ines, costs, and other financial obligations imposed by the court must be paid at the time of assessment, except when the court allows otherwise, for good cause shown.”

2. Vehicles Not Owned or Leased by the Defendant

A court may immobilize a vehicle if it was used by the offender to violate the applicable law. However, if the offender does not own or lease the vehicle used in the violation, the court’s authority to immobilize that vehicle is limited. Under MCL 257.904d(4)(a)–(b), immobilization may be ordered if authorized or required by statute, and:

- The defendant owns, co-owns, leases, or co-leases the vehicle; or
- The vehicle’s owner, co-owner, lessee, or co-lessee knowingly permitted the defendant to drive the vehicle in violation of Vehicle Code §625(2) or §904(2), regardless of whether a conviction resulted.

The statute does not define the phrase “knowingly permitted.” In the criminal law context, a person who acts “knowingly” acts with knowledge and “a purpose to do wrong.” *People v Gould*, 225 Mich App 79, 86 (1997). “Guilty knowledge means not only actual knowledge, but also constructive knowledge through notice of facts and circumstances from which guilty knowledge may be inferred.” *People v Scott*, 154 Mich App 615, 617 (1986).

Determining vehicle ownership. The arresting officer may provide proof of vehicle ownership when the ticket or complaint is presented to the court. A court may obtain a vehicle registration record through the Secretary of State or the Law Enforcement Information Network (LEIN). See MCL 257.221. The defendant is required to provide the court with the vehicle identification number and registration plate number of the vehicle involved in the violation. MCL 257.904d(3).

Notification of owner or lessee that vehicle has been immobilized. There is no statutory requirement that a non-offender owner or lessee receive notice before the immobilization or impoundment of his or her vehicle. See MCL 257.904c–257.904e. Although persons have a substantial interest in uninterrupted use of their vehicles, there is no procedural due process* right to notice and a hearing prior to impoundment of a vehicle for improper registration. *Harris v Calhoun County*, 127 F Supp 2d 871, 876 (WD Mich, 2001), relying on *Scofield v City of Hillsborough*, 862 F2d 759, 762–64 (CA 9, 1988). However, federal courts have held that notice of and a right to a prompt post-impoundment hearing is constitutionally required. *Harris, supra*, and *Towers v City of Chicago*, 979 F Supp 708, 714 (ND Ill, 1997). In *Towers*, the court held that the city was “not obligated to locate and notify every registered owner” prior to impoundment of a vehicle not in the owner’s possession when it was impounded. Instead, the city was required to use procedures “reasonably calculated” to notify such owners, and this requirement was satisfied by the ticketing police officer giving notice of the owner’s right to a hearing to the person in possession of the vehicle at the time of the alleged violation. *Towers, supra* at 715.

If a court does notify a non-offender owner or lessee before immobilizing or impounding his or her vehicle, the court may use several methods, including the following:

- Send a notice of adjudication and a notice to appear at sentencing to the owner or lessee. At sentencing, the court takes testimony on the owner’s knowledge of the circumstances surrounding the offense.
- Issue an order to the owner or lessee to show cause why the vehicle should not be immobilized. If the owner or lessee appears at the hearing, he or she has the burden of proving that the vehicle should not be immobilized.
- Require the owner or lessee to file an affidavit with the court stating that he or she had no knowledge of the circumstances surrounding the offense. If the owner or lessee does not file such an affidavit, the court immobilizes the vehicle.
- Require the prosecuting or city attorney to file a motion and request a hearing.

*The United States Supreme Court has held that denying an “innocent owner” defense in a civil forfeiture proceeding does not violate an owner’s substantive due process rights. *Bennis v Michigan*, 516 US 442 (1996). Because MCL 257.904d does provide such a defense, the statute presumably does not violate substantive due process protections. See *Tower, infra* at 717–20.

- Set a motion hearing if the owner or lessee is not present at sentencing when an immobilization order is issued. If the owner or lessee appears at the motion hearing, the order is upheld or dismissed. If the owner or lessee does not appear at the motion hearing, the order stands.
- Issue an order to immobilize the vehicle if it appears from the presentence investigation report that the owner or lessee had knowledge of the circumstances surrounding the offense. The court sends a copy of the order to the owner or lessee along with a notice of his or her right to request a hearing. The court may uphold or dismiss the order following the hearing.
- Send a petition to release an immobilization order to the owner or lessee, who must serve the prosecuting attorney with a copy and file the petition with the court. The court then holds a hearing.

3. Vehicles Exempt from Immobilization

The immobilization provisions in MCL 257.904d do not apply in cases involving certain vehicles. MCL 257.904d(7) provides that the following vehicles may not be immobilized:

- Rental vehicles. Because MCL 257.37(a) defines a vehicle's "owner" as someone having exclusive use of a vehicle for more than 30 days, the exception for rented vehicles applies only to rental agreements for 30 days or less.
- Vehicles registered in other states.
- Vehicles owned by the federal government, the State of Michigan, or a local unit of government of Michigan.
- Vehicles not subject to registration under §216 of the Motor Vehicle Code.

4. Offenses Subject to Immobilization

Depending upon the offense and number of prior offenses or violations, vehicle immobilization may be a mandatory sanction, or one imposed at the court's discretion.*

Immobilization in the Court's Discretion—The court has discretion to order immobilization for not more than 180 days for the following offenses:

- First offenses under §625(1), (3), (7), or (8) (OWI, OWVI, child endangerment, or OWPD), or a local ordinance substantially corresponding to §625(1) or (3). MCL 257.904d(1)(a).
- A moving violation committed while driving with a suspended/revoked license and occurring within seven years of one prior suspension, revocation, or denial imposed under §904(10), (11), or

*Prior convictions are discussed in greater detail at Section 1.3(G) of this volume.

(12) (which impose additional licensing sanctions on persons who commit moving violations while driving with a suspended/revoked license), or former §904(2) or (4). MCL 257.904d(2)(a).

Mandatory Immobilization—MCL 257.904d(1)-(2) require vehicle immobilization upon conviction of the following violations of §625 and §904 of the Motor Vehicle Code:

- Any violation of §625(4) or (5) (OWI or OWVI causing death or serious impairment of a body function.)
 - First-time offenders are subject to immobilization for a maximum 180 days.
 - Offenders with one conviction within seven years after a prior conviction are subject to immobilization for not less than 90 days or more than 180 days.*
 - Offenders with two or more prior convictions within ten years are subject to immobilization for not less than one year or more than three years.
- Any violation of §904(4) or (5) (DWLS causing death or serious impairment of a body function). First time offenders are subject to immobilization for not more than 180 days.
- A moving violation committed while driving with a suspended/revoked license and occurring within seven years of two or more prior suspensions, revocations, or denials imposed under §904(10), (11), or (12) (which impose additional licensing sanctions on persons who commit moving violations while driving with a suspended/revoked license), or former §904(2) or (4):
 - Offenders with any combination of two or three prior suspensions, revocations, or denials under §904(10), (11), or (12), or former §904(2) or (4) within the past seven years are subject to immobilization for not less than 90 days or more than 180 days.
 - Offenders with any combination of four or more prior suspensions, revocations, or denials under §904(10), (11), or (12), or former §904(2) or (4) within the past seven years are subject to immobilization for not less than one year or more than three years.
- A violation of §625(1), (3), (7), or (8) (OWI, OWVI, child endangerment, or OWPD) within seven years after one prior conviction or within ten years after two or more prior convictions:
 - Offenders with one conviction within seven years after a prior conviction are subject to immobilization for not less than 90 days or more than 180 days.

*See Section 1.3(G) of this volume for a definition of “prior conviction” under MCL 257.904d.

- Offenders with two or more prior convictions within ten years are subject to immobilization for not less than one year or more than three years.

5. Offenses Not Subject to Vehicle Immobilization

The immobilization provisions in MCL 257.904d do not apply in cases involving certain offenses or violations. MCL 257.904d(7) provides that immobilization may not be ordered for any of the following:

- Suspensions, revocations, or denials based on a violation of the Support and Parenting Time Enforcement Act, MCL 552.601 et seq.
- Violations of Chapter II of the Vehicle Code, regarding administration, registration, certificate of title, and anti-theft, or a substantially corresponding local ordinance.
- Violations of Chapter V of the Vehicle Code, the Financial Responsibility Act, or a substantially corresponding local ordinance.
- Violations for failure to change address, under the Vehicle Code or a substantially corresponding local ordinance.
- Parking violations, under the Vehicle Code or a substantially corresponding local ordinance.
- Bad check violations, under state law, or a substantially corresponding local ordinance.
- Equipment violations, under the Vehicle Code or a substantially corresponding local ordinance.
- A pedestrian, passenger, or bicycle violation, other than a violation of:
 - MCL 436.1703(1) or (2) (purchase, consumption, or possession of alcohol by minors); or
 - MCL 257.624a or 257.624b (open container, minor in possession of alcohol); or
 - a local ordinance substantially corresponding to the foregoing statutes.

6. Prior Suspensions, Revocations, or Denials

Under MCL 257.904d(2), a moving violation committed while driving with a suspended or revoked license and occurring within a specified number of years of prior suspensions, revocations, or denials imposed under §904(10), (11), or (12), or former §904(2) or (4), may or shall result in vehicle immobilization. Those who unlawfully operate a vehicle or commit a moving

violation while driving with a suspended or revoked license are subject to mandatory additional periods of suspension or revocation under §904(10)–(12). However, an offense occurring during a first-time suspension for failing to appear in court (FAC) or failing to comply with a judgment (FCJ) under MCL 257.321a will not count as a prior offense for purposes of enhancement under §904(10)–(12). This exemption for an FAC or FCJ suspension violation applies only once during a person’s lifetime. However, if there is a subsequent FAC or FCJ suspension violation, both it and the first violation are counted for purposes of enhancement. MCL 257.904(18).

7. Sale or Transfer of an Immobilized Vehicle

Before sentencing. Subject to certain limitations, a vehicle’s owner may sell or otherwise transfer the vehicle before sentencing. The Secretary of State will not issue a registration for a vehicle with a temporary registration plate until the violation resulting in the issuance of the temporary plate is adjudicated or the vehicle is transferred to a person subject to payment of use tax. MCL 257.219(3). MCL 257.233(4) prohibits the transfer without a court order of a vehicle subject to vehicle sanctions to a person exempt from use tax. Persons who violate this provision are subject to misdemeanor sanctions consisting of imprisonment for not more than one year or a fine of not more than \$1,000.00, or both. MCL 257.233(5).

If the offender owned the vehicle but states at sentencing that he or she sold it, the court should require proper proof of the sale and transfer of title.

After sentencing. After immobilization is ordered at sentencing, the owner may sell the vehicle, but only to persons subject to use tax, unless the court orders otherwise. Selling or transferring an immobilized vehicle to a person exempt from paying use tax without a court order is prohibited by MCL 257.904e(2). That statute states:

“A vehicle subject to immobilization under this section may be sold during the period of immobilization, but shall not be sold to a person who is exempt from paying a use tax under [MCL 205.93(3)(a)], without a court order.”

Violation of this provision is a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$100.00, or both. MCL 257.904e(5).

Transfers exempt from use tax. Transfers exempt from use tax under MCL 205.93(3)(a) occur when the transferee or purchaser has one of the following relationships to the transferor: spouse, mother, father, brother, sister, child, stepparent, stepchild, stepbrother, stepsister, grandparent, grandchild, legal ward, or a legally appointed guardian with a certified letter of guardianship.

It is not clear which court may issue an order allowing a transfer normally prohibited by MCL 257.904e(2). The circuit court has jurisdiction of appeals

from adverse decisions made by a state agency. MCL 600.631 and MCR 7.104. On the other hand, some courts believe that the court that issued the immobilization order may issue an order allowing such a sale.

8. Obtaining Another Vehicle

A defendant prohibited from operating a vehicle by immobilization may not purchase, lease, or otherwise obtain another vehicle during the immobilization period. MCL 257.904e(3). Violation of this provision is a misdemeanor punishable by imprisonment for not more than 93 days, or a fine of not more than \$100.00, or both. MCL 257.904e(5).

9. Procedure for Violations that May Result in Immobilization

If the charges against an offender may result in immobilization, the prosecuting attorney must include a statement listing the defendant's prior convictions on the complaint and information. MCL 257.625(15) and MCL 257.904(8).

An order required to be issued under §904d shall not be suspended. MCL 257.904d(5).

If a defendant is ordered imprisoned for the violation for which immobilization is ordered, the period of immobilization shall begin at the end of the period of imprisonment. MCL 257.904d(6).

In a case where immobilization is ordered, the defendant shall provide the court with the identification and registration plate numbers of the vehicle involved in the violation. MCL 257.904d(3). MCL 257.904e(8) requires certification that a vehicle ordered immobilized has in fact been immobilized. MCL 257.904e(8) states:

“The court shall require the defendant or a person who provides immobilization services to the court under this section to certify that a vehicle ordered immobilized by the court is immobilized as required.”

SCAO Form MC 267 may be used for this purpose. The form may be faxed to a service provider for certification, or the offender may be required to return the certification to the court.

The defendant may be ordered to pay the costs of immobilization and storage. MCL 257.904e(1). MCR 1.110 states that “[f]ines, costs, and other financial obligations imposed by the court must be paid at the time of assessment, except when the court allows otherwise, for good cause shown.”

10. Abstracting Requirements

An abstract required under §732 of the Motor Vehicle Code must indicate whether immobilization was ordered. The abstract must also indicate the vehicle identification and registration plate numbers, as well as the length and starting date of immobilization if ordered. MCL 257.732(3)(h)–(i).

Courts and the Secretary of State should promptly send and post changes to the defendant's driving record to ensure that an immobilization order is not circumvented.

B. Forfeiture

Vehicle forfeiture may be imposed at the court's discretion for various drunk driving or DWLS offenses under §625 and §904 of the Vehicle Code. These offenses are listed in MCL 257.625n, as follows:*

- OWI under §625(1) or (8), occurring within seven years of one prior conviction or within ten years of a second or subsequent prior conviction.
- OWVI under §625(3), occurring within seven years of one prior conviction or within ten years of a second or subsequent prior conviction.
- OWI or OWVI causing death or serious impairment of a body function under §625(4)–(5).
- Child endangerment under §625(7).
- DWLS causing death or serious impairment of a body function under §904(4)–(5).

Note: §625n has not been amended to reflect changes to §625. It refers to §625(8)(b) or (c), which now appear at §625(9)(b) or (c) and §625(10)(b) or (c), which now appear at §625(11)(b) or (c).

The vehicle forfeiture provisions in MCL 257.625n apply to vehicles that are owned by the defendant in whole or in part or leased by the defendant. MCL 257.625n(1)(a). If a vehicle subject to forfeiture is leased by the defendant, the court will order the vehicle returned to the lessor. MCL 257.625n(1)(b).

Vehicles may be seized by court order issued upon a showing of probable cause that the vehicle is subject to forfeiture. However, any forfeiture is subject to the interest of the holder of a security interest who did not have prior knowledge of or consent to the violation. MCL 257.625n(2)–(3).

*For information on forfeiture as a sanction for a specific offense, see the discussion of the offense in Chapters 3 and 4 of this volume. See Section 1.3(G) of this volume for a definition of “prior conviction.”

*The §625n forfeiture provisions do not preclude the prosecutor from pursuing forfeiture under any other Michigan statute or a local ordinance substantially corresponding to §625n. MCL 257.625n(12).

1. Commencement of Forfeiture Proceedings

If the prosecutor seeks forfeiture, the complaint and information filed in connection with the criminal offense must also include a statement listing the defendant's prior convictions. MCL 257.625(15). Vehicle Code §625n allows the prosecutor to commence vehicle forfeiture proceedings either before or after the disposition of the underlying criminal charges.*

If the vehicle is seized before disposition of the criminal proceedings, the defendant may move to require the seizing agency to file a lien against the vehicle and to return the vehicle to its owner or lessee pending the outcome of the case. The court must hear the defendant's motion within seven days after it is filed. The court may order the return of the vehicle to the owner or lessee if the defendant establishes that:

- The defendant holds the legal title to the vehicle or has a leasehold interest in it; and
- It is necessary for the defendant or a member of defendant's family to use the vehicle pending the outcome of the forfeiture action.

If the court orders the vehicle returned to the owner or lessee, it shall order the defendant to post bond in an amount equal to the retail value of the vehicle and shall also order the seizing agency to file a lien against the vehicle. MCL 257.625n(5).

The prosecutor commences forfeiture proceedings after the defendant's conviction of one of the violations listed in Vehicle Code §625n by filing a petition within 14 days after the conviction. In this case, the prosecutor must give notice that the vehicle may be forfeited by first class mail or other process to the defendant, the defendant's attorney, all owners of the vehicle, and all persons holding a security interest in the vehicle. MCL 257.625n(4).

Note: The failure of the court or prosecutor to comply with any time limit specified in §625n does not preclude the court from ordering forfeiture of a vehicle, unless the court finds that the owner or claimant suffered substantial prejudice as a result of that failure. MCL 257.625n(11).

2. Forfeiture Hearing

Within 14 days after the prosecutor gives notice that a vehicle may be forfeited, the defendant, an owner, a lessee, or a holder of a security interest may file a claim of interest in the vehicle with the court. Within 21 days after the expiration of the period for filing claims, but before or at sentencing, the court shall hold a hearing to determine:

- The legitimacy of any claim.
- The extent of any co-owner's equity interest.

- The liability of the defendant to any co-lessee. The court may order the defendant to pay a co-lessee any liability as determined at the hearing. The court's order may be enforced in the same way as a civil judgment. MCL 257.625n(8).
- Whether to order the vehicle forfeited or returned to the lessor. The return of a vehicle to the lessor under this section does not affect or impair the lessor's rights or the defendant's obligations under the lease. MCL 257.625n(9).

In considering whether to order forfeiture, the court shall review the defendant's driving record to determine whether the defendant has multiple convictions under §625 of the Vehicle Code or a substantially corresponding local ordinance, and/or multiple suspensions, restrictions, or denials under §904 of the Vehicle Code. Multiple sanctions under these provisions shall weigh heavily in favor of forfeiture. MCL 257.625n(6).

3. Disposition of Proceeds of Sale of Forfeited Vehicle

If a vehicle is forfeited under §625n, subsection (7) of the statute requires the unit of government that seized the vehicle to sell it and dispose of the proceeds in the following order of priority:

- Pay any outstanding security interest of a secured party who did not have prior knowledge of or consent to the violation.
- Pay the equity interest of a co-owner who did not have prior knowledge of or consent to the violation.
- Satisfy any order of restitution entered in the prosecution for the violation.
- Pay the claim of each person who shows that he or she is a victim of the violation to the extent that the claim is not covered by an order of restitution.
- Pay any outstanding lien against the property that has been imposed by a governmental unit.
- Pay the proper expenses of the proceedings for forfeiture and sale, including but not limited to, expenses incurred during the seizure process and expenses for maintaining custody of the property, advertising, and court costs.

The balance remaining after payment of the foregoing items shall be distributed by the court to the unit or units of government substantially involved in effecting the forfeiture. MCL 257.625n(7)(g).

Note: Transfer of a vehicle to avoid forfeiture is a misdemeanor. See Section 5.3 of this volume.

C. Registration Denial

The Secretary of State shall refuse issuance of a certificate of title, a registration, or a transfer of registration for a vehicle if the driver's license of the vehicle's owner, co-owner, lessee or co-lessee is suspended, revoked, or denied for one of the following offenses:

- A third or subsequent violation of Vehicle Code §625 or §625m or a local ordinance substantially corresponding to these sections.
- A fourth or subsequent suspension or revocation of a driver's license under Vehicle Code §904.

MCL 257.219(1)(d), (2)(d).

2.12 Abstract of Conviction Requirements

A. General Requirements for Forwarding Abstracts to the Secretary of State

MCL 257.732(1) requires court clerks and municipal judges to keep a full record of every case in which a person is charged with or cited for a violation of the Vehicle Code or a substantially corresponding local ordinance, and every case involving an offense pertaining to operation of ORVs or snowmobiles for which points are assessed under MCL 257.320a(1)(c) or (i). Abstracts of the court records must be prepared and forwarded to the Secretary of State for cases specified in the statute.

MCL 257.732(2) further requires a city or village to send a report to the Secretary of State if a department, bureau, or person within it is authorized to accept a payment of money as a settlement for a violation of a local ordinance substantially corresponding to a Vehicle Code provision.

Every person required to forward abstracts to the Secretary of State must certify for the period from January 1 through June 30 and for the period July 1 through December 31 that all abstracts required to be forwarded during the period have been forwarded. The certification must be made on a form provided by the Secretary of State and filed not later than 28 days after the end of the period covered by the certification. Failure to comply with this certification requirement is grounds for removal from office. MCL 257.732(13)–(14).

Abstracts sent to the Secretary of State are open for public inspection and are entered upon a person's master driving record. MCL 257.732(15). Courts are prohibited from ordering expunction of any violation reportable to the Secretary of State. MCL 257.732(22).

B. Form of Abstract

Forms for abstracts are furnished by the Secretary of State. MCL 257.732(3)(a)–(i) requires that the abstract be certified as correct by the signature, stamp, or facsimile signature of the person required to prepare the abstract, and that it include all of the following:

“(a) The name, address, and date of birth of the person charged or cited.

“(b) The number of the person’s operator’s or chauffeur’s license, if any.

“(c) The date and nature of the violation.

“(d) The type of vehicle driven at the time of the violation and, if the vehicle is a commercial motor vehicle, that vehicle’s group designation and indorsement classification.

“(e) The date of the conviction, finding, forfeiture, judgment, or civil infraction determination.

“(f) Whether bail was forfeited.

“(g) Any license restriction, suspension, or denial ordered by the court as provided by law.

“(h) The vehicle identification number and registration plate number of all vehicles that are ordered immobilized or forfeited.

“(i) Other information considered necessary to the secretary of state.”

C. Time for Sending Abstracts — Offenses Included in Abstract Requirements

The time requirements for sending the abstract vary according to the type of offense involved.

1. Drunk Driving Violations

MCL 257.732(1)(b) provides that an abstract must be immediately prepared and forwarded to the Secretary of State for each case charging a listed drunk driving violation in which the charge is dismissed or the defendant acquitted. The violations to which this requirement applies are as follows:

- OWI under §625(1).
- OWVI under §625(3).
- OWI or OWVI causing death or serious impairment of a body function under §625(4)–(5).
- Zero tolerance violations under §625(6).
- Child endangerment under §625(7).
- OWI (operating with the presence of drugs) under §625(8).
- Operating a commercial vehicle with an unlawful bodily alcohol content under §625m.
- Local ordinance violations substantially corresponding to §625(1), (3), (6), or (8), or §625m.

MCL 257.732(1)(c) provides that an abstract must be immediately prepared and forwarded to the Secretary of State for each case charging a violation of the following statutes:

- MCL 324.81134 or 324.81135 (drunk driving—ORV), and
- MCL 324.82127(1) or (3) (OWI or OWVI—snowmobile).

2. Other Vehicle Code Violations

In other cases where there has been a charge of or citation for violating or attempting to violate the Vehicle Code or a substantially corresponding local ordinance, an abstract must be prepared and forwarded to the Secretary of State within 14 days* after:

- A conviction;
- A forfeiture of bail;
- An entry of a civil infraction determination; or
- An entry of a default judgment.

MCL 257.732(1)(a).^{*} Exceptions to this requirement are listed in MCL 257.732(16); abstracts need not be submitted for the following convictions or civil infraction determinations:

- Parking or standing violations.
- Non-moving violations that are not the basis for a license suspension, revocation, or denial. The Secretary of State must inform the court of the offenses in this category. MCL 257.732(18).

*Beginning October 1, 2005, abstracts must be forwarded within five days.

*The court also must submit sentencing data following the abstract for §625 offenses; this information is required for the drunk driving audit under Vehicle Code §625i.

- Violations under Chapter II of the Vehicle Code (regarding administration, registration, certificate of title, and anti-theft) that are not the basis for a license suspension, revocation, or denial. The Secretary of State must inform the court of the offenses in this category. MCL 257.732(18).
- Pedestrian, passenger, or bicycle violations, other than certain violations under MCL 436.1703 (minor purchasing, consuming, or possessing alcohol), MCL 257.624a–257.624b (open container and minor-in-possession), or substantially corresponding local ordinances.
- Safety belt violations under MCL 257.710e.
- Failure to provide proof of insurance violations under MCL 257.328(1) if, before the appearance date on the citation, the person submits proof to the court that the motor vehicle had insurance at the time the citation was issued.
- Driving a commercial motor vehicle without a license violations under MCL 257.319b(4)(b)(vii) if, before the court appearance date or date fines are to be paid, the person submits proof to the court that he or she had a valid commercial driver's license on the date the citation was issued.

3. Penal Offenses Not Found in the Vehicle Code — Felonies in Which a Motor Vehicle Was Used

Under MCL 257.732(4), the court must also forward abstracts to the Secretary of State upon a person's conviction of the following penal offenses not contained in the Vehicle Code:

- Unlawful driving away a motor vehicle, MCL 750.413, or an attempt to commit this offense.
- Unlawful use of an automobile, without intent to steal, MCL 750.414, or an attempt to commit this offense.
- Failure to obey a police or conservation officer's direction to stop, MCL 750.479a, or an attempt to commit this offense.
- Felonious driving, former MCL 752.191, or an attempt to commit this offense.
- Negligent homicide with a motor vehicle, MCL 750.324, or an attempt to commit this offense.
- Manslaughter with a motor vehicle, MCL 750.321, or an attempt to commit this offense.

- Murder with a motor vehicle, MCL 750.316 (first-degree murder), and MCL 750.317 (second-degree murder), or an attempt to commit either of these offenses.
- Minor purchasing or attempting to purchase, consuming or attempting to consume, or possessing or attempting to possess alcoholic liquor, MCL 436.1703, or a local ordinance substantially corresponding to this section.
- False crime report under MCL 750.411a(2), or an attempt to commit this offense.
- A violation of motor carrier safety regulations under MCL 480.11a, or an attempt to commit an offense under this section.
- A violation of the school bus railroad track grade crossing requirements under MCL 257.1857, or an attempt to commit this offense.
- A violation of motor carrier safety regulations under MCL 474.131, or an attempt to commit an offense under this section.
- An attempt to violate, a conspiracy to violate, or a violation of a controlled substance provision listed in MCL 333.7401–333.7461, MCL 333.17766a, or a local ordinance prohibiting the same conduct, unless the person convicted is sentenced to life imprisonment or a minimum term of imprisonment exceeding one year.
- A violation of the Michigan Anti-Terrorism Act, MCL 750.543a et seq.
- A violation of MCL 500.3101–500.3103.
- A violation listed as a disqualifying offense under federal motor carrier safety regulations, 49 CFR 383.51.

Additionally, if the court determines as part of the sentence that a felony for which a person was convicted was one in which a motor vehicle or a commercial motor vehicle was used, MCL 257.732(9) and (12) require the court to forward an abstract of the record of conviction to the Secretary of State.

Note: The prosecutor must have met certain notice requirements before the court is required to send an abstract of conviction in felony cases where a motor vehicle or commercial motor vehicle was used. These are set forth in MCL 257.732(7) and (11). See Section 6.4(E) of this volume for more information.

2.13 Driver Responsibility Fee

The Secretary of State imposes a driver responsibility fee for specific violations. MCL 257.732a(2) provides for a mandatory assessment of a fixed driver responsibility fee when an individual is convicted of the specific offenses listed. The offenses discussed in Chapters 3 and 4 that require imposition of the driver responsibility fee are listed below. MCL 257.732a states in part:

“An individual, whether licensed or not, who violates any of the following sections or another law or local ordinance that substantially corresponds to those sections shall be assessed a driver responsibility fee as follows:

“(a) Upon posting of an abstract that an individual has been found guilty for a violation listed in this subdivision, the secretary of state shall assess a \$1,000.00 driver responsibility fee each year for 2 consecutive years for any of the following offenses:

(iii) A violation of section 625(1), (4), or (5), section 625m . . . or a law or ordinance substantially corresponding to section 625(1), (4), or (5), section 625m*

“(b) Upon posting of an abstract that an individual has been found guilty for a violation listed in this subdivision, the secretary of state shall assess a \$500.00 driver responsibility fee each year for 2 consecutive years for any of the following offenses:

(i) Section 625(3), (6), (7) or (8).*

(iii) Section 904.*

*See Sections 1.3(I), 3.1, 3.4, and 3.5 of this volume.

*See Sections 3.3, 3.6, 3.7, and 3.8 of this volume.

*See Chapter 4 of this volume.

2.14 Failures to Appear in Court or to Comply with a Judgment

This section addresses the misdemeanor and licensing sanctions that apply when a person fails to answer a citation or appear in court, or fails to comply with a court order or judgment.

*See Section 2.12(C), above, for a list of violations reportable under §732.

A. Misdemeanor Sanctions

MCL 257.321a(1) imposes misdemeanor sanctions of up to 93 days imprisonment and/or a \$100.00 fine for the following:

- Failure to answer a citation or a notice to appear in court for a violation reportable to the Secretary of State under MCL 257.732 or a local ordinance substantially corresponding to a violation that is reportable under Vehicle Code §732.*
- Failure to comply with an order or judgment of the court, including, but not limited to, paying all fines, costs, fees, and assessments.

B. License Suspension

In addition to misdemeanor sanctions, license suspension can result from a person's failure to answer a citation or notice to appear in court or failure to comply with a judgment as described in MCL 257.321a(1). Under MCL 257.321a(2)–(4), the court is required to notify the person that license suspension may result from his or her inaction. If the person does not appear or comply with the court's order or judgment within a stated time after receiving notice from the court, the court must report this failure to the Secretary of State. Upon receipt of the report from the court, the Secretary of State is to immediately suspend the person's license. The time requirements contained in the court's notices differ depending upon the charges brought against the person.

1. Drunk Driving and Alcohol-Related Offenses

If a person charged with certain drunk driving or alcohol-related offenses fails to appear or comply with a judgment, the notice from the court must be sent immediately by first-class mail to the person's last known address. The notice shall state that the person's license will be suspended if he or she fails to appear within seven days of issuance of the notice, or fails to comply with the court's order or judgment within 14 days of issuance of the notice. If the person fails to comply with this notice, the court must immediately notify the Secretary of State, who will immediately suspend the person's license and notify the person by first-class mail sent to the person's last known address. MCL 257.321a(3)–(4). The offenses to which these seven and 14 day time requirements apply are listed below.

MCL 257.321a(3) lists the following offenses:

- OWI under Vehicle Code §625(1), or a local ordinance substantially corresponding to this section.
- Permitting a person under the influence of alcohol or drugs to operate a motor vehicle, causing death or serious impairment of a

body function under Vehicle Code §625(2), or a local ordinance substantially corresponding to this section.

- OWVI, under Vehicle Code §625(3), or a local ordinance substantially corresponding to this section.
- Zero tolerance violations under Vehicle Code §625(6), or a local ordinance substantially corresponding to this section.
- OWI (operating with the presence of drugs) under Vehicle Code §625(8), or a local ordinance substantially corresponding to this section.

These offenses are listed in MCL 257.321a(4):

- Transporting or possessing alcoholic liquor in open container, under Vehicle Code §624a.
- Transporting or possessing alcoholic liquor in a motor vehicle by a person under 21 years old, unless required by the person's employment, under Vehicle Code §624b.
- Purchase, consumption, or possession of alcoholic liquor by a person under age 21, under MCL 436.1703.

2. Offenses Other than Drunk Driving or Alcohol-Related Offenses

In other cases of noncompliance with a judgment or failure to appear for a violation reportable under Vehicle Code §732,* the notice from the court must be mailed to the person's last known address at least 28 days after the person fails to appear or comply with an order or judgment. The notice shall state that the person's license will be suspended if he or she fails to appear or to comply with the court's order or judgment within 14 days of issuance of the notice. If the person fails to comply with this notice, the court must notify the Secretary of State within 14 days. The Secretary of State will then immediately suspend the person's license and notify the person by regular mail sent to the person's last known address. MCL 257.321a(2).

*See Section 2.12(C), above, for a list of violations reportable under §732.

3. Duration of Sanction

Suspensions imposed for offenses covered by MCL 257.321a(2) and MCL 257.321a(3) (concerning drunk driving offenses under Vehicle Code §625) will remain in effect until both of the following occur:

- Each court in which the person failed to answer a citation or notice to appear or failed to pay a fine or cost has notified the Secretary of State that the person has answered the citation or notice or appear or paid the fine or cost.
- The person has paid the court a \$45.00 driver license clearance fee for each failure to answer a citation or failure to pay a fine or cost.

Under MCL 257.321a(11)(a)-(c), the court must distribute the fee as follows:

- \$15.00 to the Secretary of State;
- \$15.00 to the local funding unit; and
- \$15.00 to the Juror Compensation Reimbursement Fund.

MCL 257.321a(5), (11).

4. Use of FAC/FCJ Suspension for Enhancement Purposes

Although drivers with license suspensions imposed under Vehicle Code §321a are subject to mandatory additional suspensions under §904(10)–(11) for committing a moving violation during the FAC/FCJ suspension, a one-time exemption from these additional sanctions applies. A moving violation during a first FAC/FCJ suspension will not be subjected to the mandatory additional sanctions in §904(10)–(12); however, this exemption applies only once during a person’s lifetime. If the person receives a second violation of an FAC/FCJ suspension, both it and the first suspension violation will be considered for purposes of enhancement. MCL 257.904(18).